United Nations

Report of the United Nations Commission on International Trade Law

on the work

of its twenty-eighth session

2-26 May 1995

General Assembly
Official Records • Fiftieth Session
Supplement No.17 (A/50/17)

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-eighth session, held in Vienna from 2 to 26 May 1995.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-eighth session on 2 May 1995. The session was opened Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel.

B. Membership and attendance

4. The General Assembly, by its resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973 the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 4 November 1991 and on 28 November 1994, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: 1/

> Algeria (2001), Argentina (1998), Australia (2001), Austria (1998), Botswana (2001), Brazil (2001), Bulgaria (2001), Cameroon (2001), Chile (1998), China (2001), Ecuador (1998), Egypt (2001), Finland (2001), France (2001), Germany (2001), Hungary (1998), India (1998), Iran (Islamic Republic of) (1998), Italy (1998), Japan (2001), Kenya (1998), Mexico (2001), Nigeria (2001), Poland (1998), Russian Federation (2001), Saudi Arabia (1998), Singapore (2001), Slovakia (1998), Spain (1998), Sudan (1998), Thailand (1998), Uganda (1998), United Kingdom of Great Britain and Northern Ireland (2001), United Republic of Tanzania (1998), United States of America (1998) and Uruguay (1998).

5. With the exception of Botswana, Cameroon, Egypt, Kenya, Slovakia and the United Republic of Tanzania, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Belarus, Belgium, Bosnia and Herzegovina, Canada, Colombia, Croatia, Czech Republic, Denmark, Gabon, Greece, Holy See, Indonesia, Iraq, Jordan, Kuwait, Monaco, Morocco, Myanmar, Netherlands, Pakistan, Paraguay, Peru, Portugal, Republic of Korea, Romania, Swaziland, Sweden, Switzerland, Tunisia, Turkey, Ukraine, Venezuela and Yemen.

7. The session was also attended by observers from the following international organizations:

(a) United Nations organs

United Nations Industrial Development Organization (UNIDO)

(b) Intergovernmental organizations

Asian-African Legal Consultative Committee (AALCC)
Hague Conference on Private International Law
International Institute for the Unification of Private Law (UNIDROIT)
League of Arab States

(c) Other international organizations

Arab Association for International Arbitration (AAAI)
Cairo Regional Centre for International Commercial Arbitration
Fédération Bancaire de l'Union Européenne
Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI)
Inter-American Commercial Arbitration Commission (IACAC)
International Association of Insolvency Practitioners (INSOL)
International Chamber of Commerce (ICC)
International Council for Commercial Arbitration (ICCA)
Tribunal Internacional de Conciliación y de Arbitraje del Mercosur (TICAMER) Union internationale des avocats

C. Election of officers 2/

8. The Commission elected the following officers:

Chairman: Mr. Goh Phai Cheng (Singapore)

Vice-Chairmen: Mr. Gavan Griffith, Q.C. (Australia)
Mr. José María Abascal Zamora (Mexico)
Mr. Tadeusz Szurski (Poland)

Rapporteur: Mr. Joseph Fred Bossa (Uganda)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 547th meeting, on 2 May 1995, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda
4. Draft Convention on Independent Guarantees and Stand-by Letters of Credit
5. Electronic data interchange: draft Model Law
6. International commercial arbitration: draft Notes on Organizing Arbitral Proceedings
7. Receivables financing: assignment of receivables
8. Possible future work: cross-border insolvency; build-operate-transfer projects; monitoring of implementation of 1958 New York Convention
9. Case law on UNCITRAL texts (CLOUT)

10. Training and assistance

11. Status and promotion of UNCITRAL legal texts

12. General Assembly resolutions on the work of the Commission

13. Other business

14. Date and place of future meetings

15. Adoption of the report of the Commission

E. Adoption of the report

10. At its 580th, 581st and 582nd meetings, on 24, 25 and 26 May 1995, the Commission adopted the present report by consensus.

II. DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

A. Introduction

11. Pursuant to a decision taken by the Commission at its twenty-first session in 1988, 3/ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit. The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or of a convention.

12. That recommendation was accepted by the Commission at its twenty-second session in 1989. 4/ The Working Group devoted its thirteenth to twenty-third sessions to the preparation of a uniform law (for the reports of those sessions, see A/CN.9/330, 342, 345, 358, 361, 372, 374, 388, 391, 405 and 408). That work was carried out on the basis of background working papers prepared by the Secretariat on possible issues to be included in the uniform law. Those background papers included: A/CN.9/WG.II/WP.63 (tentative considerations on the preparation of a uniform law); WP.65 (substantive scope of application, party autonomy and its limits, rules of interpretation); WP.68 (amendment, transfer, expiry and obligations of the guarantor); and WP.70 and WP.71 (fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction). The draft articles of the uniform law, which the Working Group decided should, as a working assumption, be in the form of a draft Convention, were submitted by the Secretariat in documents A/CN.9/WG.II/WP.67, WP.73 and Add.1, WP.76 and Add.1, WP.80 and WP.83. The Working Group also had before it a proposal by the United States of America relating to rules for stand-by letters of credit (A/CN.9/WG.II/WP.77). The text of the draft articles of the Convention as presented to the Commission by the Working Group was contained in the annex to document A/CN.9/408.

13. The Commission elected Mr. Jacques Gauthier (Canada), in his personal capacity, as chairman of the Committee of the Whole for the discussion of the draft Convention.

B. Consideration of draft articles

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

14. The text of the draft article as considered by the Commission was as follows:

> "(1) This Convention applies to an international undertaking referred to in article 2:
>
> (a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or
>
> (b) If the rules of private international law lead to the application of the law of a Contracting State,
>
> unless the undertaking excludes the application of the Convention.

> "(2) This Convention applies also to an international letter of credit other than a stand-by letter of credit if it expressly states that it is subject to this Convention.
>
> "(3) The provisions of articles 21 and 22 apply to international undertakings as defined in article 2 irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article."

15. The Commission exchanged views as to whether the draft text before it should be adopted in the form of a convention or in the form of a model law. In support of adopting a model law, it was stated that it would provide States with adequate flexibility to enable them to decide which provisions were acceptable to be incorporated into national law. It was also stated that one of the main reasons for which the Working Group had proceeded on the basis of a convention was that provisions regarding jurisdiction would be better implemented in a convention and that, since the Working Group had decided not to maintain provisions on jurisdiction, the text should be adopted as a model law.

16. Wide support, however, was expressed for maintaining the recommendation of the Working Group to adopt the draft text in the form of a convention. In support of that view it was stated that only through a convention would it be possible to establish an adequate level of uniformity and harmonization necessary to enable the smooth operation of independent guarantees and stand-by letters of credit in an international setting. As to the question of flexibility, it was pointed out, the draft text already included a fairly flexible regime by providing means of opting out of both the convention as a whole and individual provisions thereof. After deliberation the Commission agreed to adopt the draft text as a convention.

Paragraph (1)

Subparagraph (a)

17. A proposal was made to amend paragraph (1) (a) so as to take account of those instances where the guarantor/issuer might have more than one place of business. In support of that proposal it was stated that, as currently drafted, the provision did not account for cases where the undertaking was not issued at a place of business of the guarantor/issuer. Accordingly, it was proposed to amend the subparagraph to read as follows:

> "(a) If the place of business of the guarantor/issuer is in a contracting State or if the guarantor/issuer has more than one place of business, the place of business from which the issuance of the undertaking is directed, is in a contracting State, or ..."

18. Insufficient support, however, was expressed for the proposal. It was generally felt that the words "at which the undertaking is issued" in the present formulation of subparagraph (a) would adequately cater to such instances.

19. A question was raised as to whether the effect of article 1 was that parties were left only with the option of opting in or out of the Convention as a whole rather than also having the choice of modifying or excluding individual provisions. It was proposed that the draft Convention should contain a provision similar to article 6 of the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention") allowing parties to opt out of the Convention in part or in whole. In response, it was pointed out that the current provision was directed solely to the question of whether the draft Convention as a whole could be excluded, and that those instances where the parties could opt out or derogate from particular provisions were indicated in various articles by usage of words such as "unless otherwise stipulated in the undertaking... ".

20. A further question was raised as to the legal implications for parties that opted out of the draft Convention but had their place of business in a State that had implemented the Convention as national law. It was suggested that in such a case, opting out of the Convention might thus be of no practical significance. In response, it was pointed out that the draft Convention could not deal with the question of what the legal consequence would be if parties chose to exclude the Convention, in particular since that would depend on the situation obtaining in each contracting State.

21. A proposal was made to add at the end of paragraph (1) words along the lines of "or, as concerns the relationship between the guarantor/issuer and the principal/applicant, unless those parties exclude the application of the Convention". The intent of the proposal was to ensure that the principal/applicant would not be deprived of the protection of the Convention through an agreement between the guarantor/issuer and the beneficiary, an effect on third parties which, it was said, was incompatible with some legal systems. There was, however, insufficient support for the proposal.

22. A proposal to change the reference to undertaking in the chapeau of paragraph (1) to plural by replacing the words "an international undertaking" by the words "international undertakings" was referred to the drafting group.

Subparagraph (b)

23. The view was expressed that subparagraph (b) could be deleted, on the ground that it would not add substantially to the possible bases for applicability of the draft Convention. Underlying that view was the assumption that applicability on the basis of the rules of private international law would invariably lead to the use of the same connecting factor already referred to in subparagraph (a), other than in those cases in which it could serve to recognize a choice by the parties of the draft Convention as the applicable law. It was said that for such cases it would be preferable simply to include a clause in the draft Convention expressly recognizing the right of parties to opt into the draft Convention. It was also stated that the provision might simply be stating what courts would do anyway, with or without such a provision, and might therefore be unnecessary.

24. The prevailing view, however, was that there was a wider potential scope for subparagraph (b) beyond the case of opting in, and that it should therefore be retained, and that retention would also provide consistency with the approach followed in the United Nations Sales Convention. Admittedly, however, the realm of subparagraph (b) in the draft Convention was narrowed by the fact that the text already contained specific conflict-of-laws rules in articles 21 and 22. Furthermore, the Commission noted the view that the status of subparagraph (b) might be reviewed in relation to a final clause dealing with reservations to the draft Convention.

25. Subject to the above decisions, the Commission approved the substance of paragraph (1) and referred it to the drafting group.

Paragraph (2)

26. A view was expressed that paragraph (2), which was intended to recognize a right of parties to a commercial letter of credit to opt into the draft Convention, should be deleted because it would raise the spectre of possible interference or inconsistency with existing legal standards and practices as reflected in the Uniform Customs and Practice for Documentary Credits (UCP), formulated by the International Chamber of Commerce. The concern was also expressed that the formulation of the provision was not sufficiently clear as to which types of instruments were the intended target of the opting-in facility, and that, at any rate, it was not necessary for the draft Convention to recognize expressly a right to elect application of the draft Convention for commercial letters of credit as such a right would generally be recognized.

27. The general view in the Commission, however, was that a provision along the lines of paragraph (2) should be retained. It was noted that the right of parties to commercial letters of credit to opt into the draft Convention was not itself at issue, as no objections to that were raised. That would therefore obviate the main element of potential controversy and leave only the questions of whether it would be helpful to recognize expressly that right and how such a provision might be formulated.

28. As regards the concern about generating potential inconsistency with standards and practices embodied in the UCP, it was noted that one of the main purposes of the draft Convention was to support application by the parties of contractual rules such as the UCP. In that connection, it was recalled that throughout the process of developing the draft Convention, which involved individuals who had themselves been involved in the preparation of the UCP, a foremost guiding principle was to preserve consistency with, and respect for, the UCP in its sphere of applicability. The Commission noted that evidence of the deference of the draft Convention to the contractual autonomy of the parties was found in the fact that the text was replete with references to such freedom to diverge from various of its provisions, and that, were any inconsistencies to be perceived, they could easily be overcome in that manner should parties be so inclined.

29. Furthermore, it was noted that the possibility of inconsistency with contractual rules was minimized since the main purpose of the draft Convention was to deal with issues that fell outside the possible scope of contractual rules, and with respect to which a lack of uniformity constituted a serious practical hinderance for the international practice of independent guarantees and stand-by letters of credit (e.g., questions such as international uniformity as to the point of establishment of the undertaking and measures that courts could be empowered to take to deal with the problem of fraudulent or abusive demands for payment). The Commission further noted that, to the extent that it might be felt that the draft Convention could conceivably give rise to any practices divergent from the UCP, it needed to be borne in mind that the possibility of divergent practices was expressly provided for in the UCP itself, since one of the cardinal principles of the UCP, which applied by contractual agreement, was that the parties could exclude or modify any of its provisions.

30. Having agreed that the opting-in clause for commercial letters of credit should be retained, the Commission turned its attention to the concern that had been raised as to whether there would be sufficient clarity as to the type of instruments intended to be covered by the opting-in clause. It was recalled that the current formulation, which was intended to cover in particular commercial letters of credit without specifically naming such instruments, resulted from a recognition that the terms "commercial letter of credit" and "stand-by letter of credit" were not universally used. Accordingly, the Commission accepted and referred to the drafting group a suggestion to utilize a formulation along the lines of "international letters of credit other than an undertaking as defined in article 2".

Paragraph (3)

31. The Commission affirmed the substance of paragraph (3), the intent of which was that the provisions of articles 21 and 22 would, standing alone, apply in any situation in which a choice would have to be made between the laws of different States in order to determine the law applicable to an undertaking, whether or not in the end it would be determined that it was the draft Convention that would apply. It was pointed out that the provision was thus intended to provide a binding rule of private international law to be used in determining the applicable law, and that its focus was therefore not limited to subparagraph (b) of paragraph (1). At the same time, the view was widely shared that the existing formulation was not sufficiently clear. It was pointed out, for example, that uncertainty might arise not only as to the formulation itself, but also from the position of the provision in relation to the provision in paragraph (1). As to the question whether different meanings might be attributed to the word "international" as it appeared in paragraph (3), in article 4, and in articles 21 and 22, the view was expressed that the Convention should not give it different meanings, but should apply the meaning given in article 4 to all cases. The Commission referred paragraph (3) to the drafting group with a view to addressing the concerns that had been raised.

Article 2. Undertaking

32. The text of the draft article as considered by the Commission was as follows:

> "(1) For the purposes of this Convention, an undertaking is an independent commitment, usually referred to as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.
>
> "(2) The undertaking may be given:
>
> (a) At the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;
>
> (b) On the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or
>
> (c) On behalf of the guarantor/issuer itself.
>
> "(3) Payment may be stipulated in the undertaking to be made in any form, including:
>
> (a) Payment in a specified currency or unit of account;
>
> (b) Acceptance of a bill of exchange (draft);
>
> (c) Payment on a deferred basis;
>
> (d) Supply of a specified item of value.
>
> "(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person."

Paragraph (1)

33. The Commission noted that the word "other" in the formulation "or upon presentation of other documents" was meant to indicate that a demand had to be in documentary form in order to be within the scope of the Convention. It was suggested that another approach to dealing with undertakings allowing an oral demand would be to invalidate oral demands by a provision in the Convention stating that oral demands were invalid. It was noted in that respect that, were such undertakings to be included in the scope of the draft Convention, according to article 15, a demand had to be in a form set out in article 7 (2), which would have the effect of ruling out oral demands. Preference was expressed, however, for maintaining the present formulation, the consequence of which was to leave undertakings providing for oral demands out of the scope of application of the Convention.

34. A question was raised as to whether the words "upon simple demand or upon presentation of other documents" might not lead to the misinterpretation that the draft Convention only dealt with instances of a simple demand and a demand by way of presentation of other documents, but did not cover instances where a demand would be accompanied by other specified documents. The Commission agreed that the intention

was to cover a demand accompanied by other documents and referred the matter to the drafting group, to make that intention clearer.

35. A suggestion was made that it should be made clear that an undertaking could only be issued by a guarantor/issuer that had the legal capacity to do so under the law to which the guarantor/issuer was subject. It was pointed out that if such a requirement were added, it would have to be carefully formulated so as not inadvertently to provide guarantor/issuers with a defence under the draft Convention of ultra vires. A note of caution was raised, however, against including such a requirement in the draft Convention, in particular in the provisions dealing with the scope of application, as it might lead to parties having to investigate the capacity of the guarantor/issuer in order to establish whether a particular undertaking was within the scope of the draft Convention. After deliberation, the Commission decided to maintain the current formulation, in which the draft Convention did not deal with the question of the legal capacity of parties to an undertaking.

36. A proposal was made for the deletion of the words "usually referred to as an independent guarantee or as stand-by letter of credit", on the grounds that it was a formulation that was alien to some legal systems and might lead to confusion as to exactly which types of instruments the draft Convention was intended to cover. In response, it was pointed out that the intention underlying the formulation was to help clarify that commercial letters of credit and other instruments of an independent and promissory nature were not covered by the definition of "undertaking" in article 2. It was further noted that it was due to the difficulties in arriving at a generally agreeable definition of the terms "independent guarantee" and "stand-by letter of credit" that had led to the usage of the words "usually referred to as". Various suggestions of a drafting nature were made with the intention of alleviating the concerns raised regarding the words "usually referred to". Among the suggestions made in that regard were to replace the words "usually referred to as" with words such as "commonly known as", "known in practice" or "in the ordinary course of business known as". After deliberation, the Commission agreed to replace the words "usually referred to" by the words "known in international practice".

Paragraphs (2), (3) and (4)

37. The Commission found the substance of paragraphs (2), (3) and (4) to be generally acceptable.

38. Subject to the above decisions, the Commission found the substance of article 2 to be generally acceptable and referred it to the drafting group.

Article 3. Independence of undertaking

39. The text of the draft article as considered by the Commission was as follows:

> "For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate), or to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations."

40. A concern was raised that there was a possible inconsistency between article 3, which provided, as a basic element of independence, that the undertaking was not subject to the validity of the underlying transaction, and article 19 (2) (b), which provided that one of the instances in which a demand had no conceivable basis was that the underlying obligation had been declared invalid by a court. It was suggested that such an inconsistency could be cured by providing that article 3 was subject to the provisions of article 19 (2) (b). In response, it was pointed out that the two provisions were not inconsistent since article 3 was

aimed at defining the concept of independence for purposes of establishing those instruments that were within the scope of application of the draft Convention and at differentiating such undertakings from accessory instruments, which directly depended on the existence and validity of the underlying obligation; by contrast, article 19 (2) (b) was aimed at invalidating, for reasons of fraud, certain of those undertakings that were governed by the draft Convention. It was suggested, however, that the provision would be clearer if the words "not subject to" were replaced by the words "not dependent upon". That suggestion was accepted and referred to the drafting group.

41. Subject to the above decisions, the Commission found the substance of draft article 3 to be generally acceptable and referred it to the drafting group.

Article 4. Internationality of undertaking

42. The text of the draft article as considered by the Commission was as follows:

> "(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.
>
> "(2) For the purposes of the preceding paragraph:
>
> (a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;
>
> (b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking."

43. A proposal was made to delete paragraph (2) (b) and to replace the words "... as specified in the undertaking ..." in paragraph (1) by a formulation along the following lines:

> "(1) An undertaking is international if the places of business of any two of the following persons are in different States and if those places are specified in the undertaking: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.
>
> "(2) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking."

44. The intent of the proposed revision was to provide a rule for the case in which one or more of the places of business were not indicated expressly in the undertaking, and to thus track more closely the more objective approach in article 1 (2) of the United Nations Sales Convention. The proposal was also intended to provide greater clarity in the case in which the undertaking specified an objectively wrong place of business. It was said that the current text would enable parties to opt into the Convention by listing an incorrect place of business and that only a straightforward opting in should be countenanced. The proposal would also remove the reference to the habitual residence of parties that did not have "places of business" as such.

45. The above proposal, however, did not receive sufficient support. It was generally felt that the current text, according to which internationality would be determined on the basis of the information contained on the face of the undertaking instrument, was better suited for the documentary character and context of the transactions covered by the draft Convention. It was pointed out that the types of transactions covered by

the draft Convention required the guarantor/issuer to look only at the face of the undertaking and in that way differed from the transactions covered by the United Nations Sales Convention. It was said to be therefore appropriate for the text to utilize an approach along the lines followed in the United Nations Convention on International Bills of Exchange and International Promissory Notes, which also focused on the information contained within the four corners of the instrument. Moreover, the above proposal was too complicated in that it required ascertaining both the actual place of business and the one listed and, in case of inconsistency between the two, led to the non-application of the Convention.

46. The Commission then turned to several questions relating to the categories of parties listed in paragraph (1) whose places of business were relevant to the determination of internationality of the undertaking. In response to a question as to why it was necessary to list the confirmer in article 4 when, under article 6, the confirmer was included within the term "guarantor/issuer", the Commission recalled the basis of and affirmed the decision by the Working Group. A reference to the confirmer had been included by the Working Group, while no such reference was considered appropriate as regards the place of business of the counter-guarantor. The Working Group had noted that, in the typical case of confirmation, the guarantor/issuer and the beneficiary would be in different countries, and the confirmer would be in the same country as the beneficiary. By contrast, the guarantor/issuer of a guarantee supported by a counter-guarantee could typically be in the same country as the beneficiary, to the effect that that domestic guarantee would be transformed into an international undertaking subject to the draft Convention by virtue of the addition to paragraph (1) of a reference to the place of business of the counter-guarantor (A/CN.9/405, para. 92).

47. It was also pointed out in the discussion that the terminological system established in article 6 and used in the draft Convention provided for the general use of the term "guarantor/issuer", with the effect that provisions referring to the guarantor/issuer might, depending upon the context of a given transaction, apply separately and individually to a counter-guarantor or a confirmer. At the same time, that general terminological approach did not mean that, in particular for the purposes of article 4, the places of business of both the guarantor/issuer and a confirmer could not be considered for the purposes of internationality in a single situation.

48. A proposal was made to add to the categories of parties listed in paragraph (1) for the purposes of determining internationality references also to the places of business both of transferees of undertakings and of assignees of proceeds of undertakings. It was suggested that such an addition would increase the extent of uniformity of law achieved by the draft Convention and would provide greater legal certainty, in particular for undertakings such as "direct pay stand-by letters of credit", in which there might be a multiplicity of assignees in diverse countries. Views in support of such an extension included that it would be acceptable to have such an extension for cases in which there would be, for example, an indication in the undertaking of assignability, or the issuance of a separate undertaking to implement payment to the third party. The prevailing view, however, was that it would not be appropriate to expand the categories referred to in paragraph (1) as proposed. A concern underlying that decision was that adding mention of transferees and assignees to paragraph (1) would expose parties to an undertaking to the risk that the contractual basis of the undertaking would be altered merely by virtue of a transfer or an assignment of proceeds. It was noted that the result intended by the proposal would already obtain under the current text in the frequent cases where the transfer was effected by the issuance of a new undertaking.

49. After deliberation, the Commission found the substance of draft article 4 to be generally acceptable and referred it to the drafting group.

CHAPTER II. INTERPRETATION

Article 5. Principles of interpretation

50. The text of the draft article as considered by the Commission was as follows:

> "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit."

51. The Commission found the substance of draft article 5 to be generally acceptable and referred it to the drafting group.

Article 6. Definitions

52. The text of the draft article as considered by the Working Group was as follows:

> "For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:
>
> (a) "Undertaking" includes "counter-guarantee" and "confirmation of an undertaking";
>
> (b) "Guarantor/issuer" includes "counter-guarantor" and "confirmer";
>
> (c) "Counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;
>
> (d) "Counter-guarantor" means the person issuing a counter-guarantee;
>
> (e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;
>
> (f) "Confirmer" means the person confirming an undertaking;
>
> (g) "Document" means a communication made in a form that provides a complete record thereof."

53. The Commission found the substance of the draft article 6 to be generally acceptable, noting that the clarification suggested for article 2, relating to the words "upon simple demand or upon presentation of other documents", would be considered by the drafting group with respect as well to subparagraphs (c) and (e).

54. Subject to the above decision, the Commission found the substance of draft article 6 to be generally acceptable.

CHAPTER III. FORM AND CONTENT OF UNDERTAKING

Article 7. Issuance, form and irrevocability of undertaking

55. The text of the draft article as considered by the Commission was as follows:

> "(1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.
>
> "(2) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.
>
> "(3) From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.
>
> "(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable."

56. A question was raised as to whether paragraphs (1) and (2) were mandatory in the sense that the parties could neither agree on other times of issuance nor agree to establish oral undertakings. In response, it was pointed out that paragraph (1) only provided a definition of issuance. It was noted that it was important to set the time of issuance as a definite point in time as it established the time from which the guarantor/issuer was bound by the undertaking. With regard to paragraph (2), it was pointed out that it reflected the principle agreed on in the Working Group that the draft Convention would not cover oral undertakings.

57. A proposal was made to provide in paragraph (1) that issuance only occurred when the undertaking was directed by the guarantor/issuer to the beneficiary by a voluntary act so as to rule out instances where the undertaking might leave the sphere of control of the guarantor/issuer without a positive expression of the wish to be bound by the undertaking, for example, in cases of theft. However, it was pointed out that, under the current formulation in the draft Convention, any issuance of the undertaking that was unauthorized by the guarantor/issuer could be a case of fraud that would be adequately dealt with under the provisions of article 19.

58. A suggestion was made that the current definition of "issuance" in paragraph (1) left a gap in the draft Convention. To illustrate such a gap, a hypothetical case was cited of a bank in country A instructing a bank in country B to issue an undertaking at a set point of time. It was stated that, in such a situation, even if both countries were contracting States, such an undertaking would not fall within the Convention as the place of business at which the undertaking would have been issued would not be that of the bank in country A. It was pointed out, however, that such a case illustrated that, in the application of a general rule on issuance, one might have to assess the nature of inter-bank relationships in determining when the undertaking actually left the sphere of control of the guarantor/issuer. After deliberation, the Commission decided to maintain the substance of article 7 along the current lines.

Article 8. Amendment

59. The text of the draft article as considered by the Commission was as follows:

> "(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (1) of article 7.

"(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if:

(a) The amendment has previously been authorized by the beneficiary; or

(b) If the amendment consists solely of an extension of the validity period of the undertaking;

if any amendment does not fall within subparagraphs (a) and (b) of this paragraph, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph (1) of article 7.

"(3) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment."

Paragraph (1)

60. Noting that the reference to paragraph (1) of article 7 would be corrected to refer to paragraph (2) of that article, the Commission found the substance of paragraph (1) to be generally acceptable and referred it to the drafting group.

Paragraph (2)

61. A proposal was made to delete paragraph (2) on the grounds that it focused on the relationship between the guarantor/issuer and the beneficiary and, unlike the UCP provisions dealing with amendment, did not require the consent of the confirmer, although it was realized that paragraph (3) referred to the implications of an amendment for the position of a confirmer. Thus, it was said, that would possibly lead to inconsistent effects of the two texts. The prevailing view, however, was that it was useful to retain a provision addressing the questions raised in paragraph (2), and that it would not be out of line with the UCP. There was insufficient support expressed for a proposal to include in the text a definition of the notion of "issuance" of an amendment, as that was not understood to raise necessarily matters at substantial variance with the notion of issuance of an undertaking.

62. A view was expressed that paragraph (2) was worded in such a way that it might affect revocable as well as irrevocable undertakings, while article 8 of the UCP allowed the issuer to amend its revocable undertaking at any time before the beneficiary made a demand thereunder. However, after deliberation, the Commission found that the existing approach was satisfactory on that point, and it was unnecessary to provide further specificity as regards the question of amendment of revocable credits. It was pointed out, for example, that a distinction could be drawn between the question of revocation and the question of the procedure for, and the time of effectiveness of, amendments. It was further pointed out that the matter could be considered adequately dealt with by way of interpretation of the clause at the beginning of paragraph (2) referring to the contractual freedom of the parties to opt out of the provision.

63. As regards the precise content of paragraph (2), the Commission was generally of the view that it should retain admissibility of the concept of preauthorization of amendments by the beneficiary, referred to in subparagraph (a). It was also agreed that, contrary to a proposal that was made, preauthorization should not be made subject to a form requirement in accordance with article 7 (2). However, several proposals were made with a view to refining the formulation of that concept. One such proposal was to refer not to amendments that were preauthorized, but to refer instead to amendments that were "requested" by the beneficiary, so as to reflect that in many instances it was a request from the beneficiary that actually gave rise to the amendment. There was some hesitation, however, to refer to the notion of "request", as it was pointed out that it might give rise to uncertainty at the operational level, in particular in the case of

undertakings in which amendments were authorized in advance and not actually requested as such. That might be the case, for example, when the amount of the undertaking was increased or decreased automatically, and, by drawing, the beneficiary consented to the increase or decrease in the amount, with the condition of such consent reflected in the prospectus or other documents relating to a bond issue for which the undertaking serves as a payment instrument.

64. The Commission considered further the objections that had been raised in the Working Group to the inclusion of subparagraph (b), which provided for the effectiveness upon issuance, without the beneficiary's consent, of amendments consisting solely of an extension of the validity period of the undertaking. Those objections centered around the case of the "variable-interest-rate financial stand-by letter of credit", which, if extended, might deprive the beneficiary of electing a more advantageous fixed interest rate at the end of the initial validity period, although in such a case the extension of the validity period was not truly the sole effect of the amendment. A concern was expressed, however, that without a provision along the lines of subparagraph (b) there might be uncertainty in some cases as to whether the beneficiary could rely on a notification from the guarantor/issuer of an extension, since it was often the case in practice that the beneficiary would not respond to such a notification, but would merely eventually make a demand for payment within the extended time frame. It was suggested that, were subparagraph (b) deleted, that concern might be met by using a formulation in subparagraph (a) along the lines of "previously authorized or otherwise consented to by the beneficiary". After deliberation, the Commission took the view that subparagraph (b) should be deleted in view of the potential difficulty that it raised for stand-by letter of credit practice.

65. Consequent to the exchange of views that had taken place concerning the formulation of paragraph (2), it was proposed that the provision might usefully be limited to stating the proposition that, unless otherwise agreed, an undertaking was amended when consented to. It was suggested that such a more limited and simplified provision would have the advantage of avoiding an overly precise statement of the time of effectiveness of an amendment and would therefore be more suited to being applied in a myriad of possibly differing circumstances that would arise in practice in individual cases, and in which it might be difficult to apply a more precise rule concerning time when amendments take effect. The Commission declined, however, to accept such an approach, as it was felt that the basic approach in the existing text would provide a substantially greater contribution to uniformity of law. It was therefore decided to retain paragraph (2) in its current form, with the deletion, however, of subparagraph (b).

66. The Commission referred to the drafting group a suggestion that it be made clearer that the provision at the beginning of paragraph (2) recognizing party autonomy extended also to the latter portion of the paragraph, which stated the general rule that amendments that were not pre-authorized took effect upon acceptance.

Paragraph (3)

67. The Commission found the substance of paragraph (3) and, subject to the above decisions, the remainder of draft article 8, to be generally acceptable and referred the article to the drafting group.

Article 9. Transfer of beneficiary's right to demand payment

68. The text of the draft article as considered by the Commission was as follows:

> "(1) The beneficiary's right to demand payment under the undertaking may be transferred only if so, and to the extent and in the manner, authorized in the undertaking.

> "(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it."

69. A question was raised as to the intended meaning of the words "to the extent and in the manner authorized in the undertaking". It was pointed out in response that, in the case of transfer of an undertaking, there was not only the issue of the basic authority to transfer, but also the question of what percentage of the undertaking was subject to transfer and questions of procedure, such as whether the transfer should involve the issuance of a second instrument containing certain modifications. It was noted at the same time that the drafting group could usefully attempt a formulation that would more clearly distinguish those different elements of authorization.

70. The attention of the Commission was drawn to the question of whether, in the case of the insolvency of the beneficiary, the right to demand payment under the undertaking would be considered a part of the insolvency estate, such that it could be included in the assets available to satisfy creditors. It was agreed that the matter was beyond the scope of the draft Convention.

71. After deliberation, the Commission found the substance of the draft article to be generally acceptable and referred it to the drafting group.

Article 10. Assignment of proceeds

72. The text of the draft article as considered by the Commission was as follows:

> "(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.
>
> "(2) If the guarantor/issuer or another person obliged to effect payment has received a notice of the beneficiary in a form referred to in paragraph (1) of article 7 of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking."

73. The Commission affirmed the decision of the Working Group not to impose any particular form requirement on a waiver by the beneficiary of its right under paragraph (1) to assign the proceeds.

74. The Commission noted that the formulation "notice of the beneficiary" in paragraph (2) was meant to indicate that only the beneficiary, from the viewpoint of practice, could be an effective source or originator of a notice to the guarantor/issuer of the assignment. A question was raised, however, as to why that should be so since under the general law of assignment of various legal systems, the assignee could give effective notice of the assignment to the debtor, based on the notion that it was the assignee who was the party with an interest in getting paid pursuant to the assignment. In response, it was pointed out that it was important that the beneficiary be the party to author (though not necessarily deliver) the notice as it was the right of the beneficiary to payment that was being assigned. It was further pointed out that in the international transactions covered by the draft Convention, which differed from other commercial contexts, it was particularly important that, since only the beneficiary named in the undertaking could make a demand for payment or make an irrevocable assignment, the beneficiary should author the notice of the assignment in order for it to be reliable. It was also pointed out that article 10 did not aim to regulate all matters related to assignments and that paragraph (2) was limited to the notice of the assignment, which would result in

discharge of the obligor upon payment to the assignee. A suggestion was made that a solution might be to state that the notice of the assignment could be issued by the assignee with the consent or authorization of the beneficiary. It was stated, however, that emphasis in the provision should be on the beneficiary as the author of the notice.

75. It was suggested that the formulation "notice of the beneficiary" was ambiguous and could lead to misinterpretation as to who should be the source of the notice. Accordingly, it was decided that it be indicated that the notice should originate from the beneficiary, while not suggesting that what was required was actual physical delivery by the beneficiary.

76. The Commission decided against adding the term "irrevocable" to the title of the draft article, as it was felt that it would not be in line with the fact that paragraph (1) constituted a general recognition of the beneficiary's right to assign proceeds, whether or not the assignment was irrevocable. At the same time, it was noted that in actual practice revocable assignments of proceeds were of limited practical value.

77. Subject to the above decisions, the Commission found the substance of article 10 to be generally acceptable and referred it to the drafting group.

Article 11. Cessation of right to demand

78. The text of the draft article as considered by the Commission was as follows:

"(1) The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement of the beneficiary of release from liability in a form referred to in paragraph (1) of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in a form referred to in paragraph (1) of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

"(2) The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article. However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraphs (c) or (d) of paragraph (1) of this article preserve any rights of the beneficiary under the undertaking."

Paragraph (1)

Subparagraph (a)

79. The Commission found the substance of subparagraph (a) to be generally acceptable, noting that the reference to paragraph (1) of article 7 would be corrected to refer to paragraph (2) of that article.

Subparagraph (b)

80. A proposal was made to amend subparagraph (b) so as to allow for the choice of the parties on the form in which termination of the undertaking could be made. It was pointed out that, since article 8 (1) provided parties with the opportunity to go so far as to stipulate the possibility of oral amendments, parties should be provided with a similar opportunity with regard to terminations. The Commission accepted the proposal and referred it to the drafting group.

Subparagraph (c)

81. A proposal was made to delete the words "unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking", since, as it constituted a reference to a case in which it could not be considered that the "amount available" had fully been paid, the exemption was not necessary. It was pointed out, however, that the rationale for referring to such automatically renewable undertakings was to indicate clearly that, even in those instances when the nominal value of the undertaking had been fully drawn, the undertaking remained valid pending the renewal of the amount. On that understanding, the Commission decided to retain the current formulation of subparagraph (c).

Subparagraph (d)

82. The Commission found the substance of subparagraph (d) to be generally acceptable.

Paragraph (2)

83. A concern was expressed that the current formulation of paragraph (2), permitting the parties to agree that only the return of the documents embodying the undertaking could trigger cessation of the right to demand payment, might lead to the undesirable effect that, even where the beneficiary subsequently issued a statement of release to the guarantor/issuer, such a statement of release would be of no effect unless it were accompanied by a return of the documents. It was suggested that a better formulation would be that occurrence of any of the events referred to in subparagraphs (a) to (d) of paragraph (1) would extinguish the right to demand payment, even if the beneficiary retained the document embodying the undertaking.

84. Various suggestions were made to remedy the above-mentioned concern. One such suggestion was to reformulate the first sentence of paragraph (2) so as to delete the words "either alone or in conjunction with the events referred to in subparagraphs (a) or (b) of paragraph (1) of this article", and to delete from the second sentence the words "subparagraphs (c) or (d) of". However, it was pointed out that it might be important to maintain the difference between the events referred to in subparagraphs (a) and (b) of paragraph (1), which depended on actions taken by the beneficiary, while those referred to in subparagraphs (c) and (d) did not. Another proposal was to delete paragraph (2) and to insert a subparagraph (e) in paragraph (1) which would state that, if so stipulated in the undertaking, return of the documents embodying the undertaking would cease the right to demand payment but that retention of the documents after occurrence of the events in subparagraphs (a) to (d) would not preserve any rights of the beneficiary. Yet another proposal along the same lines was to maintain paragraph (2), but to delete the words "subparagraphs (c) or (d) of" from the second sentence. The suggestion was also made that, in order to defer to contractual

freedom of the parties, it might be provided that the undertaking could stipulate that return of the documents was absolutely necessary to trigger cessation of the right to demand, despite the occurrence of the events referred to in subparagraphs (a) or (b) of paragraph (1). None of the above proposals, however, attracted wide support.

85. After deliberation, the prevailing view in the Commission was to retain the text along its current lines. In affirming the existing approach, the Commission noted that it was important to indicate clearly instances when possession of the documents did not preserve the rights of the beneficiary so as to avoid suggesting that undertakings under the draft Convention could conceivably have attributes of negotiability, and to avoid the possibility of fraudulent circulation of undertakings under which the right to payment had ceased. It was also recalled that such an approach would better clarify the situation in those legal systems where mere possession of the documents might still be taken as sufficient proof of legitimacy of a beneficiary's claim.

Article 12. Expiry

86. The text of the draft article as considered by the Commission was as follows:

> "The validity period of the undertaking expires:
>
> (a) At the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;
>
> (b) If expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer receives confirmation that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;
>
> (c) If the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document, when six years have elapsed from the date of issuance of the undertaking."

Subparagraph (a)

87. The Commission found the substance of subparagraph (a) to be generally acceptable.

Subparagraph (b)

88. A suggestion to replace the word "confirmation" with a more suitable word was accepted and referred to the drafting group on the basis that the term "confirmation" had a particular defined meaning in the draft Convention which was not the meaning intended in subparagraph (b).

89. A question was raised as to why subparagraph (b) made reference to "an act or event not within the guarantor/issuer's sphere of operations". In response, it was pointed out that, although subparagraph (b) was intended to rule out non-documentary conditions in general, the words in question were meant to permit the taking into account by the guarantor/issuer of events that were within its direct and immediate sphere of operation and thus did not require it to engage in any outside investigations, for example, checking that an advance payment had been made at its own counters.

Subparagraph (c)

90. A concern was expressed that the current formulation of subparagraph (c) could be misinterpreted as covering the case in which the undertaking stipulated an expiry date and an expiry event. A suggestion was made to add the words "and an expiry date has not been stated in addition", after the reference to the non-occurrence of the expiry event, so as to clarify the matter. The matter was referred to the drafting group. However, it was pointed out that subparagraph (c) would in any case, in view of its opening proviso, not be applicable where an expiry date was stipulated, and that the situation could be understood to be subject to the general rule of the six-year limit, without the suggested addition. It was also noted that the understanding in the Working Group had been that, if the undertaking stipulated both an expiry time and the occurrence of an event, the first to occur of the two would trigger expiry.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 13. Determination of rights and obligations

91. The text of the draft article as considered by the Commission was as follows:

"(1) Subject to the provisions of this Convention, the rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein.

"(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice."

Paragraph (1)

92. A question was raised as to why paragraph (1) did not mention the rights and obligations of the principal/applicant, whose rights and duties were referred to or implicated in some of the provisions in the draft Convention. In response, it was pointed out that article 13 was intended to regulate only the rights and obligations arising out of the undertaking, which were primarily the rights and obligations of the guarantor/issuer and of the beneficiary. A proposal was made to add the words "arising out of the undertaking" between the words "beneficiary" and "are", so as to clarify the scope of article 13. Although a view was expressed that such additional words were not necessary from a drafting standpoint, the Commission decided to accept the change in the formulation in the expectation that it would increase the clarity of paragraph (1).

93. A concern was expressed that the words "subject to the provisions of this Convention" were not clear and might be taken to mean that the undertaking would be subject only to the mandatory provisions of the Convention, or that all the provisions of the draft Convention were intended to be mandatory, or at least all those that did not expressly provide for party autonomy. In response, it was stated that the words "subject to the provisions of this Convention" were meant to indicate that the rights and obligations of the parties would be subject to the mandatory provisions of the Convention, to the terms and conditions of the undertaking and to all non-mandatory provisions of the Convention which were not excluded or modified by the parties. It was further pointed out that that formulation was not intended to address the issue of which provisions were mandatory and which were not as that was an issue that was addressed in each specific article.

94. Various suggestions of a drafting nature were made with the intention of avoiding possible misinterpretations, in particular because of the usage of the words "subject to". Among the suggestions made was to use formulations such as "rights and obligations arising out of the undertaking are determined by this Convention", or "except where provided for in this Convention,". After deliberation the Commission decided that a clearer formulation would be achieved by deleting the words "subject to the provisions of this Convention" and adding the words "and by the provisions of this Convention" at the end of paragraph (1). The Commission requested the drafting group to implement its decisions, as above, with respect to paragraph (1).

Paragraph (2)

95. A suggestion was made that the current formulation of paragraph (2) might lead to the misinterpretation that, even where the parties expressly excluded certain usages, a court or arbitral tribunal could nevertheless, by construction, apply such usages. It was suggested that addition of words along the lines of "unless the application of such usages is specifically excluded by the parties" would make the text clearer. Objections were expressed, however, to the proposal. It was pointed out that, in effect, it was likely that any such express stipulation by the parties would be part of the terms and conditions of the undertaking and would therefore not be ignored by a court or an arbitral tribunal. It was further pointed out that paragraph (2) represented a balanced compromise agreed on in the Working Group, which balance might be upset by the suggested addition, in particular since, even with the parties' express stipulation in the undertaking against recourse to certain usages, a court or arbitral tribunal might still wish to refer to such usages in order to rely on a basic concept or principle to resolve a fundamental issue not provided for in the undertaking. After deliberation, the Commission decided to maintain paragraph (2) along the current lines.

96. After deliberation, the Commission found the substance of article 13, subject to the above decisions, to be generally acceptable and referred it to the drafting group.

Article 14. Standard of conduct and liability of guarantor/issuer

97. The text of the draft article as considered by the Commission was as follows:

> "(1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.
>
> "(2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct."

Paragraph (1)

98. The Commission found the substance of paragraph (1) to be generally acceptable.

Paragraph (2)

99. A question was raised as to whether the liability of the guarantor/issuer referred to in paragraph (2) was in relation only to the beneficiary or also to the principal/applicant. In response, it was stated that paragraph (2) should be read together with paragraph (1), which would indicate that the liability was owed for failure to perform obligations arising out of the undertaking or out of the Convention; while those obligations were essentially owed to the beneficiary, there were some that were owed to the principal/applicant.

100. A proposal was made to delete the word "grossly" in paragraph (2). In support of the proposal it was stated that the guarantor/issuer should be liable not only for gross negligence but also for simple negligence. In response, it was pointed out that the provision was not aimed at providing the guarantor/issuer with exemption from liability for negligence, but to provide a limit to the extent to which the parties could contract out of liability for negligence. It was recalled in that connection that there were certain commercial situations in which the parties would freely agree to a lower standard of care in the examination of demands for payment, and that the provision was meant to take account of such practices. On that understanding, the Commission decided to retain the current formulation of paragraph (2).

101. After deliberation, the Commission found the substance of article 14 to be generally acceptable and referred it to the drafting group.

Article 15. Standard of conduct and liability of guarantor/issuer

102. The text of the draft article as considered by the Commission was as follows:

> "Any demand for payment under the undertaking shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the undertaking. In particular, any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made to the guarantor/issuer at the place where the undertaking was issued, unless another person or another place has been stipulated in the undertaking. If no certification or other document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that the demand is not in bad faith or otherwise improper."

103. The Commission noted that the reference in the first sentence to paragraph (1) of article 7 would be corrected to refer to paragraph (2) of that article.

104. The Commission agreed that the second sentence, which authorized parties to the undertaking to depart from the general rule that any of the documents required to be presented in order to obtain payment should be presented to the guarantor/issuer at the place where the undertaking was issued, should also allow them to stipulate in the undertaking another solution on the issue of time and, for example, agree that mere dispatch, rather than also receipt, of such documents needed to take place prior to the expiry of the validity period.

105. It was proposed that the last sentence of article 15, which established an implied certification by the beneficiary making a demand for payment under a simple demand undertaking that the demand was not fraudulent or abusive in accordance with the provisions in article 19, should be expanded to provide for such a presumption also in cases of undertakings in which the demand for payment was to be accompanied by documents.

106. The Commission agreed to the proposed modifications of the text and, subject to those decisions, found the substance of draft article 15 to be generally acceptable and referred it to the drafting group.

Article 16. Examination of demand and accompanying documents

107. The text of the draft article as considered by the Commission was as follows:

> "(1) The guarantor/issuer shall examine the demand and any other, accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are

consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

"(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days, in which to examine the demand and any other, accompanying documents and to decide whether or not to pay, and if the decision is not to pay, to issue notice thereof to the beneficiary. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, such notice shall be made by teletransmission or, if that is not possible, by other expeditious means and shall indicate the reason for the decision not to pay."

Paragraph (1)

108. The Commission found the text of paragraph (1) to be generally acceptable.

Paragraph (2)

109. A proposal was made to clarify the point when the seven business days referred to in paragraph (2) began to count. It was proposed that the seven days should begin to be counted from the day of presentation of the demand. However, the Commission agreed to a proposal that the seven days should begin to count from the day after presentation on the understanding that such a rule would conform to current practice in that respect, as reflected in the UCP.

110. Another proposal made with regard to the seven-business-day period was that it should be reduced to either three or five business days. In support of the proposal it was stated that, unlike the practice with regard to commercial letters of credit, examination of documents for independent guarantees and stand-by letters of credit did not require such a long period of time. However, the proposal did not gain sufficient support. It was noted that the rule in paragraph (2) was that the guarantor/issuer should examine the documents within a reasonable time, with the seven-day period established as the outer limit, and that the rule was in conformity with the UCP rule.

111. Yet another proposal made with regard to the seven-business-day period was that paragraph (2) should expressly provide that each party who would be examining the documents could avail itself of such a period. In support of the proposal, it was stated that such a rule would be in conformity with practice obtaining in that respect as reflected in article 13 (c) of the UCP, which provided for seven days for each examining bank. Some hesitation was expressed, however, to amend the current text in that respect. In deciding to maintain the current formulation, the Commission noted that, in light of the definition of "guarantor/issuer" in article 6 (b) as including "counter-guarantor" and "confirmer", the term "guarantor/issuer" in paragraph (2) should be read to mean also either the counter-guarantor or the confirmer depending on the context. It was also noted that the question of whether a bank "nominated" to examine documents was acting as an agent of the guarantor/issuer would be relevant to the question of how many such seven-day periods would be involved.

Article 17. Payment of demand

112. The text of the draft article as considered by the Commission was as follows:

"(1) Subject to article 19 the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 14. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

> "(2) Any payment against a demand that is not in accordance with the provisions of article 14 does not prejudice the rights of the principal/applicant."

113. The Commission noted that the references to article 14 would be corrected to refer to article 15. Also, the Commission requested the drafting group to determine the extent to which the title could refer simply to "payment" in all language versions.

Paragraph (1)

114. A suggestion was made that the phrase "subject to article 19" at the beginning of paragraph (1) seemed to give prominence to the exemption of non-payment pursuant to article 19 at the expense of the main import of article 17, which was that, upon presentation of a conforming demand in accordance with article 15, payment had to be made. It was proposed that the words "subject to article 19" should be deleted. A question was also raised as to the interplay between the implied certification of good faith upon presentation provided for in article 15 and the provisions of article 19, where the fraud had to be manifest and clear.

115. Preference was expressed, however, for maintaining the current text without changes. It was pointed out in that regard that it was important to maintain the difference between the implied certification of good faith in article 15 and the provisions of article 19, by which such implication of good faith would be vitiated if the fraud was manifest and clear.

Paragraph (2)

116. The Commission found the substance of paragraph (2) to be generally acceptable and referred it to the drafting group.

Article 18. Set-off

117. The text of the draft article as considered by the Commission was as follows:

> "Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant."

118. A suggestion was made that the reference to "any claim" was too wide as article 18 should only exempt from set-off those claims arising from the underlying transaction. It was also suggested that the words "assigned to it by the principal/applicant" were overly restrictive, as they failed to cover those instances where the assignment of the claim to the guarantor/issuer might be arranged through third parties. It was suggested that a better formulation might be to characterize those claims that were exempt from set-off by using a formulation such as "except any claims arising out of the underlying transaction".

119. Various other suggestions were made with a view to better clarifying the text in that regard. A proposal to delete the words "to it", so as to preclude circumvention by way of indirect assignment, was objected to on the basis that it would leave the provision too vague regarding to whom the assignment was being made. Another proposal aimed at the same objective was to state that any assignment originating from the guarantor/issuer was exempt from set-off. None of those proposals, however, received sufficient support. In deciding to maintain the current formulation, the Commission noted that expanding the provision in the manner suggested would put the guarantor/issuer in the untenable position of having to investigate to a potentially excessive degree the source of assignments used for purposes of set-off. As to the types of claims that could be exempt from set-off, it was pointed out that the intention of article 18 was to exempt from set-off not just those claims arising from the underlying transaction, but also any other claims that the principal/applicant might assign to the guarantor/issuer.

120. A question was raised as to whether the right of set-off could be exercised at any time by the guarantor/issuer and, if so, whether that implied that the guarantor/issuer could be released from the undertaking before even a conforming demand was made. In response, it was pointed out that, as provided for in article 18, set-off was only a means of payment which could only be exercised once a demand had been made in accordance with the terms and conditions of the undertaking.

121. A proposal was made to provide that set-off could only be exercised by the guarantor/issuer with the consent of the beneficiary on the basis that, in some instances, a set-off might negatively prejudice the rights of the beneficiary in particular with regard to changing exchange rates or differing rates of interest. The proposal did not, however, gain sufficient support.

122. A proposal to add the words "or instructing party" to the end of article 18 was accepted by the Commission as a useful clarification to the text.

123. Subject to the above decisions, the Commission found the substance of article 18 generally acceptable and referred it to the drafting group.

Article 19. [Obligation not to make payment]

124. The text of the draft article as considered by the Commission was as follows:

"[(1) (a) If, in the view of the guarantor/issuer, it is manifest and clear that:

(i) Any document is not genuine or has been falsified;

(ii) No payment is due on the basis asserted in the demand and the supporting documents; or

(iii) Judging by the type and purpose of the undertaking, the demand has no conceivable basis,

and for that reason payment would not be in good faith, payment shall not be made to the beneficiary.

(b) In such event, [where the principal/applicant brings to the attention of the guarantor/issuer the presence of one of the elements in subparagraph (a),] the principal/applicant shall [, unless otherwise stipulated in the undertaking or agreed elsewhere by the guarantor/issuer and the beneficiary]:

(i) Indemnify the guarantor/issuer against any claim or liability resulting from non-payment, and,

(ii) If requested by the guarantor/issuer, apply for a judicial or arbitral determination that non-payment is justified.]

"(2) For the purposes of paragraph (1) (a) (iii) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfillment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary."

125. The view was expressed that the title would be more indicative of the subject dealt with in the draft article if it referred directly to fraudulent or abusive calls. It was also noted that grounds existed for non-payment beyond those dealt with in the draft article, including embargoes and force majeure, so that a more general expression such as "non-payment" might also be considered. It was noted in response, that the Working Group had found it preferable to avoid using terms such as "fraud" or "abuse", in view of divergent understandings and degrees of familiarity with such expressions, and that at any rate the question of the title would have to await a final determination of the content and approach of draft article 19.

126. The Commission then exchanged views on the approach reflected in the draft version of article 19. The primary question posed in that exchange of views was whether the provisions should be framed in terms of a duty of the guarantor/issuer in cases of improper demand, or whether in such cases the guarantor/issuer should merely have a right to withhold payment. It was noted that the approach in the current draft reflected an approach imposing a duty on the guarantor/issuer not to make payment in cases of a manifestly and clearly improper demand, where such payment would be in bad faith, coupled with an obligation on the part of the principal/applicant to indemnify the guarantor/issuer for liability resulting from non-payment and to obtain a court or arbitral order blocking payment if requested to do so.

127. Various reservations were expressed as regards the approach reflected in the current text. Particular emphasis was placed on the notion that the undertaking was the guarantor/issuer's own commitment, involving its reputation as a reliable paymaster in international trade, and that it would therefore be more appropriate not to impose a duty to dishonour a demand for payment in the circumstances referred to in the draft article. A better approach, it was suggested, would be to leave intact in such cases the discretion of the guarantor/issuer, without thereby compelling the principal/applicant to reimburse the guarantor/issuer for a payment against an improper demand. An objection to the reference in paragraph (1) (a) (iii) to there being "no conceivable basis for the demand" was said to be illustrative of the concern that the approach based on a duty would compromise the independence of the undertaking by placing the guarantor/issuer in the position of investigating the circumstances of the underlying transaction.

128. A discretionary approach was said to be more in line with the essence of the r[illegible] of the guarantor/issuer in the context of the type of independent undertakings covered by the draft C[illegible]ion, which was to assess the facial conformity of documentary demands for payment with the terms and co[illegible]ions of the undertaking. An approach imposing a duty not to pay in cases of improper demand, it was said, would be unacceptable to guarantor/issuers, as it would in effect require them to police the behaviour of the parties to underlying commercial transactions. It was suggested that the price structure of the business of independent guarantees and stand-by letter of credit practice would not accommodate the increase in the risk to be borne by guarantor/issuers that imposition of a duty not to pay would entail, and that other mechanisms were available to commercial parties to address the risk of such cases, in particular commercial insurance.

129. In support of a duty not to pay in cases of improper demand, it was said that such an approach would be more in line with the basic obligation under the draft Convention to act in good faith. In addition, particular importance was attributed to a concern that basing draft article 19 on the notion of a right not to pay would render article 20 unworkable in a variety of jurisdictions in which provisional court measures would not be available to block improper demands if the guarantor/issuer were not under a duty to dishonour an improper demand. It was also stated that an approach based on a duty would be workable because, as evidenced in the current draft, it could be circumscribed tightly and sensitive to the position of the

guarantor/issuer by references such as "manifest and clear", "in the view of the guarantor/issuer", and "good faith", as well as by the protection afforded to the guarantor/issuer by the provision requiring a principal/applicant alleging fraud to indemnify the guarantor/issuer and to apply for a court order if requested to do so. A further consideration was that an approach based on a duty not to pay would be in harmony with the notion that, if in fact there was impropriety, the guarantor/issuer should ultimately not be held to the payment obligation and should rather not pay.

130. The exchange of views in the Commission revealed a considerable interest in the suggestion that the differing considerations raised as to the question of the duty versus right not to pay might be considered to be adequately taken into account by some sort of reference to the different relationships of the guarantor/issuer involved. Such an approach would recognize that, from the standpoint of its relationship with beneficiary, the guarantor/issuer could be considered to have a right not to pay. At the same time, that would not prejudice the possibility that, from the standpoint of its contractual relationship with the principal/applicant, the guarantor/issuer could be considered to have a duty not to pay an improper demand, with the effect that payment against such a demand could deprive the guarantor/issuer of its right to claim reimbursement from the principal/applicant. A suggestion of a similar type was to provide simply that in the circumstances of impropriety of the demand no payment was due the beneficiary.

131. Apart from the basic question of whether to phrase article 19 in terms of a duty or of a right not to pay, various views were expressed as to specific elements of the current formulation of the draft. Sympathy was expressed for the view that the words "in the view of the guarantor/issuer" could be dispensed with, since it would be desirable to inject into the provision a somewhat greater degree of objectivity, with the effect of a point of reference based on the conduct of a "reasonable guarantor/issuer". It was suggested in the same vein that reference could be made to a standard based on international banking practice.

132. A concern about the expression "if shown facts" was that it might raise the spectre of investigation of facts by the guarantor/issuer, and could be viewed as unclear or imprecise as to whether it referred to both of two possible scenarios: when what was manifest and clear was inferred from documentary examination, and when it was concluded on the basis of additional information presented to or in the possession of the guarantor/issuer.

133. A number of interventions were directed to the deletion of paragraph (1) (b), providing for an obligation on the part of the principal/applicant to indemnify the guarantor/issuer, on the grounds that it was a matter that could adequately be dealt with at the contractual level.

134. The view was expressed that an express rule should be provided for counter-guarantees in the case of an improper demand under the guarantee to which the counter-guarantee relates. The effect of the proposed rule would be that fraud in the demand would not automatically render the demand under the counter-guarantee fraudulent, and that a call under the counter-guarantee would be deemed improper only if there was complicity between the beneficiary making the call and the guarantor.

135. From the above discussion, a number of different possible approaches were distilled, reflecting various combinations of the considerations and views that had been expressed. One, minimalist, approach would be to state simply grounds for non-payment. Such an approach did not attract wide support, as the Commission felt that it would not achieve a satisfactory degree of uniformity since it would leave open a number of important questions. Another approach, essentially based on the existing text, would be framed in terms of a duty to dishonour, linked to an indemnification obligation on the part of the principal/applicant, though not necessarily containing a reference to the principal/applicant applying for a court order at the behest of the principal/applicant. A third possible approach would be based on discretion, whether expressed in terms of a right to pay or a right to dishonour, with references to the guarantor/issuer acting in good faith and possibly to standards of international practice of independent guarantees and stand-by letters of credit.

136. A fourth possible approach would combine elements of both the duty approach and the discretion approach, based on the degree to which the impropriety was "manifest and clear" or merely "highly probable", including also a statement to the effect that the action of the guarantor/issuer would not prejudice the rights of the principal/applicant or the beneficiary to pursue court measures to challenge or block the action of the guarantor/issuer. Such a combined duty and discretion approach, however, did not attract sufficient support, in particular since it was not perceived as being capable of providing a sufficient degree of certainty for the position of the guarantor/issuer.

137. Of the above possible approaches, the prevailing view in the Commission was in favour of an approach based on the right of the guarantor/issuer to withhold payment. At the same time, it was generally felt that the provision should be formulated in such a way as to make clear that it was a right "as against the beneficiary", so as not to preclude that, as against the principal/applicant, the guarantor/issuer could be considered to have a duty not to pay against an improper demand.

138. At the same time, in order to address the concern that framing article 19 in terms of a right of the guarantor/issuer to refuse payment would constitute an obstacle in some jurisdictions to the issuance of provisional court measures, the Commission agreed to include a provision in article 19 intended to help overcome that problem in those jurisdictions. The provision would expressly state that, in the circumstances of impropriety referred to in article 19, the principal/applicant had a right to provisional court measures in accordance with article 20. It was not felt to be necessary, however, to refer in that context to rights of the beneficiary not being prejudiced by the guarantor/issuer, since that was not a question within the scope of article 19. In particular, it was noted that the beneficiary was not precluded by article 19 from pursuing an action for wrongful dishonour of the demand for payment.

139. A proposal was made to delete the notion of "manifest and clear" in article 19 as the guarantor/issuer would in fact have a duty not to pay if there would actually be fraud. It was affirmed, however, that the article would retain the reference to the impropriety being "manifest and clear" to the guarantor/issuer. Those words were generally felt to be necessary to preserve the independent character of the obligations of the guarantor/issuer to the beneficiary. Reflecting the discussion that had taken place, it was further agreed that the words "in the view of the guarantor/issuer" could be dispensed with and that it should be made clear that the right of the guarantor/issuer being referred to was "as against the beneficiary." The Commission further agreed that the existing paragraph (2) would be retained along its current line and it did not adopt a suggestion that article 19 should deal with the position of innocent third parties. It was also agreed that the provisions in paragraph (1) (b), concerning an obligation of the principal/applicant to indemnify the guarantor/issuer and to apply for a court order if requested to do so, which had been added by the Working Group as part of an approach framed in terms of a duty, would now be omitted.

140. On the basis of the above understanding, the Commission referred article 19 to the drafting group, including the question of whether to use the expression "withhold payment" in place of "refuse payment". It had been suggested that the word "withhold" might be more appropriate, in that it would better convey the possibility that a decision by the guarantor/issuer might be later revised by the guarantor/issuer itself or by a court.

CHAPTER V. PROVISIONAL COURT MEASURES

Article 20. Provisional court measures

141. The text of the draft article as considered by the Commission was as follows:

> "(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the

beneficiary, one of the elements referred to in paragraph (1) of article 19 is present, the court, on the basis of immediately available strong evidence, may issue a provisional order to the effect that the beneficiary does not receive payment or that the amount of the undertaking held by the guarantor/issuer or the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

"(2) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

"(3) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than those referred to in paragraph (1)(a)(i), (ii), or (iii) of article 19, or use of the undertaking for a criminal purpose."

142. Suggestions were made for the deletion of article 20. One reason given was that the law on provisional relief by courts was well settled in national laws and that the Convention should not interfere with that area of law. Furthermore, draft article 20 addressed a limited number of points concerning provisional relief, and the provisions on those points might not mesh harmoniously with the rest of the provisions in the applicable national law on provisional relief. Another reason given in favour of deletion was that, in the particular area of independent guarantees and stand-by letters of credit, provisional relief was inappropriate in the sense that courts either should not interfere with the payment obligation of the guarantor/issuer or, in justified cases, should terminate that payment obligation by a definitive decision.

143. As an alternative to deleting draft article 20, it was suggested that, instead of approaching the matter by the formulation "... the court ... may issue a provisional order ...", the provision should be based on a formulation along the lines of "the principal/applicant may request the court ...". The purpose of the modification was to avoid the risk of interfering with the prerogatives of the court.

144. The Commission did not adopt the suggestions to delete the draft article or to change its approach. It was considered important to establish the right of access to the court by the principal/applicant when that was necessary to prevent the beneficiary from receiving payment in the cases specified in draft article 19. It was also considered important that the right of court access, which with variations existed in many jurisdictions, should be clearly circumscribed so as to avoid undue interference of courts in payments under independent guarantees or stand-by letters of credit. At the same time, the provision did not attempt to deal in detail with procedural questions, which were left to the national law. Furthermore, as repeatedly stated during the preparatory work, one of the main purposes of the draft Convention was to harmonize the law in the area of fraud without thereby compromising the independent nature of the undertaking; that purpose could only be achieved by addressing provisional court relief. Moreover, the provision had added utility because the approach adopted by the Commission with regard to draft article 19 (see above, paras. 137 and 138) now referred to the right of the principal/applicant to provisional court measures. It was noted that a previous draft article on insolvency of the principal/applicant and on any other circumstance that might affect the ability or obligation of the principal/applicant to reimburse the guarantor/issuer, was deleted because it was understood that insolvency of the principal/applicant or those other circumstances would not be grounds for an injunction or otherwise for refusing payment (draft article 17 (1 ter) (A/CN.9/WG.II/WP.80 and A/CN.9/391, para. 127).

Paragraph (1)

145. The expression "high probability" was criticized as opening too broad an avenue for the issuance of provisional court measures, thus potentially compromising the independent nature of the undertaking and possibly inciting principal/applicants to attempt to delay payment. A suggestion was made to underpin the independent nature of the undertaking by replacing that expression by a requirement that the basis for issuing

a provisional court measure had to be "manifest and clear". In that context, a view was expressed that the standard of proof set out in current paragraph (1) was not consistent with article 19 as in some instances the guarantor/issuer would have a duty to pay although the court could issue a provisional order to block payment. Suggestions were also made to replace the expression "strong evidence" by an expression such as "irrefutable evidence". It was said that courts were able, also in proceedings concerning provisional relief, to judge whether the principal/applicant established irrefutably that the demand for payment was manifestly and clearly improper. Similarly, it was suggested to replace the reference to "serious harm" by a reference to "irreparable harm".

146. In support of the existing text, it was said that the use of differing standards in articles 19 and 20 was justified since the positions and functions of a guarantor/issuer examining a demand, on the one hand, and a court determining whether to issue provisional measures, on the other hand, were different. It was also said that the suggested modifications would raise the requirements for provisional court measures to an excessive degree and thus render it virtually impossible to obtain provisional relief, which would prejudice legitimate interests of the principal/applicant. Furthermore, as requests for provisional relief were often considered by courts without, or after only a limited, hearing of the party against whom the provisional court measure was directed, it was not realistic to require "irrefutable evidence". Moreover, the suggested modifications did not take proper account of the difference between court proceedings aiming at a definitive resolution of the dispute, which required clear evidence of fraud, and court proceedings concerning provisional relief, which required a somewhat lesser standard of proof that the demand was improper.

147. Another proposal was to delete the qualifier "strong" before the word "evidence" so as to leave the question of the standard of proof to the law outside the Convention.

148. Noting that the formulation reflected in the paragraph was aimed at being applied in a variety of jurisdictions, the Commission decided to leave it unchanged.

149. The Commission agreed that the words "elements referred to in paragraph (1) of article 19" were to be understood as a reference to the instances covered in subparagraphs (a), (b) and (c) and not also to the requirement as regards the guarantor/issuer, expressed in the chapeau of paragraph (1), that those instances be manifest and clear. The drafting group was requested to find a formulation that would express that understanding more clearly.

150. A concern was expressed that article 20 might be interpreted as providing a basis for blocking reimbursement by the guarantor/issuer to confirming or nominated banks that had made payment in good faith. It was pointed out in response that inter-bank reimbursement arrangements fell outside the scope of the Convention and that the article was limited to dealing with the blocking of payment to the beneficiary. In order to clarify that, it was agreed to reformulate paragraph (1) along the following lines: "... the court ... may issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or a provisional order blocking the proceeds of the undertaking paid to the beneficiary, taking into account ...".

Paragraph (2)

151. One suggestion was to delete paragraph (2) and leave the matter of providing security as a condition for provisional relief to the applicable law other than the Convention. Another suggestion was that providing security should be a condition for granting a provisional court measure. The Commission retained the substance of the paragraph unchanged, considering that it was important to allow the court to require security and give it discretion in considering whether in a given case security should be required.

Paragraph (3)

152. A proposal was made to delete paragraph (3) as the paragraph was considered too restrictive. However, the proposal did not attract sufficient support.

153. A view was expressed that the paragraph was not intended to prevent the principal/applicant from seeking provisional court measures with respect to its contractual rights against the guarantor/issuer in accordance with the national law. The matter was not further discussed.

Counter-guarantees

154. A suggestion was made to make it clear that, in the case of a counter-guarantee, article 20 would not provide a basis for blocking payment by the counter-guarantor to the guarantor who had paid the demand in good faith. The Commission agreed to express that by way of a provision in paragraph (2) of article 19 to the effect that a provisional court measure could be obtained to block payment under the counter-guarantee only when the guarantor had made payment in bad faith.

155. A suggestion was made to state clearly in the draft Convention the principle that provisional court measures affecting the beneficiary who demanded payment under a guarantee did not automatically extend to the counter-guarantee related to that guarantee; similarly, it was suggested to state that provisional court measures affecting the guarantor in whose favour a counter-guarantee had been issued did not automatically extend to the guarantee in favour of the ultimate beneficiary. The Commission did not consider it necessary to include such statements in the draft Convention, since, as had been affirmed by the Working Groups at successive sessions, it followed from articles 3 and 6 that a counter-guarantee was an undertaking independent of the guarantee to which the counter-guarantee related.

CHAPTER VI. CONFLICT OF LAWS

Article 21. Choice of applicable law

156. The text of the draft article as considered by the Commission was as follows:

> "The undertaking is governed by the law the choice of which is:
>
> (a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or
>
> (b) Agreed elsewhere by the guarantor/issuer and the beneficiary."

157. The view was expressed that the words "or demonstrated by the terms and conditions of the undertaking" in subparagraph (a) derogated from the position found under a number of private international law conventions which state that a choice of law by the parties had to be expressly stated and not deduced as a hypothetical will of the parties. A proposal was made to delete those words so as to provide that a choice of law by the parties had to be expressly made in the undertaking.

158. The proposal did not, however, attract sufficient support. It was pointed out that the current formulation of subparagraph (a) represented a compromise developed by the Working Group that reflected current trends with regard to choice of law clauses in commercial law texts. It was further pointed out that subparagraph (a) could not be interpreted as giving effect to the hypothetical will of the parties as it specifically referred to the terms and conditions of the undertaking.

159. The suggestion was made that, as currently formulated, in particular when read together with paragraph (1) of article 1, article 21 implied that the guarantor/issuer and the beneficiary could agree on a choice of law that would then affect the principal/applicant without its consent, or they could exclude from the undertaking even those provisions in the Convention that were meant to provide some protection to the principal/applicant. It was proposed that the words "or, as concerns the relationship between the guarantor/issuer and the principal/applicant, unless those parties exclude the application of the Convention" should be added to the end of paragraph (1) of article 1 so as to ensure that the beneficiary and the guarantor/issuer could not exclude, as regards the relationship of the guarantor/issuer and the principal/applicant, those provisions that related to that relationship, without the agreement of the principal/applicant and the guarantor/issuer.

160. After deliberation, the prevailing view in the Commission was for the retention of paragraph (1) of article 1 and also article 21 along the current lines. The Commission noted that the general approach of the draft Convention was to cover the relationship between the guarantor/issuer and the beneficiary and that, while there were a few provisions that applied to the relationship between the principal/applicant and the guarantor/issuer, there were some provisions meant for the protection of the principal/applicant relating in particular to the principle of good faith. It was further pointed out that the addition of the suggested words in an article related to the scope of application would unduly complicate the provision, which was one that should be easily determinable as it related to the issue of whether or not the Convention was applicable to a particular undertaking.

Article 22. Determination of applicable law

161. The text of the draft article as considered by the Commission was as follows:

> "Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued."

162. The suggestion was made that article 22 did not cater for instances when the guarantor/issuer might not be a commercial enterprise with a place of business but a private individual with only a place of residence, a possibility that was contemplated by article 4. A proposal was made to state that, in such instances, the undertaking would be governed by the law of the place where the guarantor/issuer had its habitual residence. The Commission agreed that it was an issue that needed to be clarified also for a number of other provisions, and requested the drafting group to determine whether it would be feasible to include a general provision covering instances where the guarantor/issuer had a habitual place of residence rather than a place of business.

163. Subject to the above decision, the Commission found the substance of article 22 to be generally acceptable and referred it to the drafting group.

CHAPTER VII. FINAL CLAUSES

Article A. Depositary

164. The text of the draft article as considered by the Commission was as follows:

> "The Secretary-General of the United Nations is the depositary of this Convention."

165. The Commission found the text of article A to be acceptable.

Article B. Signature, ratification, acceptance, approval, accession

166. The text of the draft article as considered by the Commission was as follows:

"(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until ....[the date two years from the date of adoption].

"(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

"(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.

"(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations."

167. The question was posed whether to consider providing for a period of signature for the draft Convention that would stretch for three years from the date of its adoption. It was decided, however, to remain with the two-year period suggested in the draft placed before the Commission.

Article C. Application to territorial units

168. The text of the draft article as considered by the Commission was as follows:

"(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

"(2) These declarations are to state expressly the territorial units to which the Convention extends.

"(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State.

"(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State."

169. The Commission noted that the formulation of the draft article might be affected by the manner in which the question of possible references to habitual residence was dealt with elsewhere in the draft Convention. The substance of the draft article was otherwise found to be generally acceptable.

Article D. Effect of declaration

170. The text of the draft article as considered by the Commission was as follows:

"(1) Declarations made under article [C] at the time of signature are subject to confirmation upon ratification, acceptance or approval.

> "(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
>
> "(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
>
> "(4) Any State which makes a declaration under article [C] may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary."

171. The Commission found the substance of article D to be generally acceptable.

Article E. Reservations

172. The text of the draft article as considered by the Commission was as follows:

> "No reservations may be made to this Convention."

173. Differing views were expressed as to whether the draft Convention should countenance a right on the part of States becoming parties to the draft Convention to make reservations. One view was that such a right should be recognized with regard to particular provisions on which divergent views had been expressed during the preparation of the draft Convention or which were perceived by some as perhaps not being sufficiently clear. Reference was made in that regard to article 20, concerning provisional court measures, and to article 1 (2), which, without defining "international letter of credit", obliged Contracting States to apply the Convention to such letters of credit whenever parties to such letters of credit so wished. Another proposal was that States should simply be accorded the right to pick and choose those provisions against which they would lodge reservations.

174. In support of permitting reservations it was suggested that, with such a facility, the draft Convention would generate wider acceptability and adherence. In the discussion the question was also raised whether a reservation might be permitted enabling States to endow the draft Convention with a mandatory character beyond what was contemplated in the text.

175. After deliberation, the prevailing view was that the draft Convention should not permit reservations. In support of that decision, it was noted that the current text represented the culmination of years of work on a carefully crafted package of provisions that represented a compromise intended to balance the interests of various parties involved in undertakings of the type covered, and designed to take into account various perspectives and traditions represented by different practices and legal traditions. It was suggested that permitting reservations would undermine the degree of uniformity that the draft Convention was intended to achieve, and would rather give rise to a situation in which the actual effect of the draft Convention would be subject to substantial uncertainty. It was also pointed out that throughout the preparation of the current text, including at the current session of the Commission, solutions had been reached without there being any insistence that any of those solutions should be subject to a right of reservations. It was stated, in response, that the right to make reservations had been demanded. As regards article 20, it was noted that the provision had a key role to play in giving meaning to the compromise positions that had been worked out with respect to the question of how to deal with exceptional cases of improper demands. It was further noted that that provision merely established a minimum standard for the availability of such measures, and for dealing with the uncertainty that might otherwise exist in some legal systems as to whether such measures would in fact

be available for the cases dealt with by the draft Convention. Lastly, it was pointed out that the possible need for reservations was diminished by the flexibility inherent in the draft Convention, illustrated in particular by the fact that the parties to an undertaking would remain free to opt out of the draft Convention in its entirety, or to exclude or modify many of its individual provisions.

Article F. Entry into force

176. The text of the draft article as considered by the Commission was as follows:

> "(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession.
>
> "(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.
>
> "(3) This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (a) or the Contracting State referred to in subparagraph (b) of paragraph (1) of article 1."

177. The Commission agreed that the number of instruments of ratification, acceptance, approval or accession to be required for entry into force of the draft Convention should be set at five. It was felt that such a figure would be more appropriate in the light of the objective of promoting uniformity of law, than would be a lower figure. In accordance with that decision, the substance of article F was found to be generally acceptable.

Article G. Denunciation

178. The text of the draft article as considered by the Commission was as follows:

> "(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.
>
> "(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary."

179. The Commission affirmed the use of the term "denunciation" as appropriate since it was in line with terminology traditionally used in international treaties.

180. It was observed that the Vienna Convention on the Law of Treaties used the term "contracting State" to refer to States that had consented to be bound by a treaty, whether or not the treaty had entered into force, and that the use of the term in article G might raise the question of whether article G would apply to a withdrawal by a State prior to the entry into force of the draft Convention for that State. In response, it was noted that the current formulation reflected that used in other Conventions prepared by the Commission.

181. After deliberation, the Commission found the substance of the draft article to be generally acceptable.

C. Consideration of report of drafting group

Article 1. Scope of application

182. The Commission considered a text prepared by the drafting group intended to clarify the provision on independent applicability of articles 21 and 22 (see above, para. 31), which read as follows and which it was proposed might be relocated to the position immediately following paragraph (1):

> "(1 bis) In any situation involving a choice between the laws of different States, the law applicable to undertakings as defined in article 2 shall be established in accordance with articles 21 and 22, whether or not the Convention applies pursuant to paragraph (1) of this article."

183. As an alternative to having in article 1 the above text, which did not attract sufficiently wide support, it was proposed to deal with the matter in chapter VI, with a provision along the lines of "the provisions of articles 21 and 22 apply independently of paragraph (1) of article 1". It was suggested that such a formulation, and its new location, would be simpler and display more evidently that what was involved was a conflict-of-laws rule for the courts of States parties to the draft Convention, rather than a rule as to the specific cases in which the draft Convention was to apply, the latter being the subject dealt with in paragraph (1).

184. The prevailing view, however, was that the principle of the applicability of articles 21 and 22 independently of paragraph (1) should be addressed in paragraph (3) of article 1, so that the reader of the text would at the outset have a complete indication of the applicability of the various parts of the draft Convention. It was agreed that the provision should read as follows:

> "(3) The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of paragraph (1) of this article".

185. The Commission decided not to accept a suggestion to delete the word "international", which was said to be an unnecessary restriction on a conflict-of-laws rule. That suggestion met with some hesitation in the Commission about the possibility of articles 21 and 22 being applied to undertakings of a domestic nature, for example, when the parties to such a domestic undertaking sought to exclude the application of the domestic law.

186. Interest was expressed in a proposal to replace in the new version of paragraph (3) the words "as referred to in article 2" by words along the lines of "as defined in this Convention". The intent of the proposal was to clarify that, for the purposes of applying articles 21 and 22, the definitions in articles 4 and 6 would be taken into account, even if, according to paragraph (1) of article 1, the Convention would not apply. It was felt that such clarification was not necessary.

187. The Commission also exchanged views as to whether paragraph (1) of article 1 should refer to issuance of an undertaking from the "habitual residence" of the guarantor/issuer, so as to expressly bring within the scope of the draft Convention undertakings so issued. It was pointed out in that connection that such a possibility was already suggested in article 4 (2) (b), which provided that a habitual residence listed on the face of an undertaking could be relevant for the purposes of determining internationality. It was also recalled that a proposal had been made earlier in the discussion and referred to the drafting group to add a reference in article 22 to the possibility that an undertaking would be issued from a habitual residence (see above, para. 162).

188. Considerable hesitation was expressed, however, to refer at the outset of the draft Convention, in article 1, to issuance from a "habitual residence", as that might appear to give undue prominence to such issuances which, in practice, were not a prominent feature of the business of independent guarantees and

stand-by letters of credit. An alternative proposal was made to have a general provision along the lines of: "the term 'place of business' refers to habitual residence if the guarantor/issuer concerned does not have a place of business." That drew the observation that such a provision would possibly not obviate the need to have the reference to "habitual residence" in article 4 (2) (b).

189. After deliberation, the Commission decided that, with the exception of article 4 (2) (b), it would not be necessary to refer in article 1 or in a general provision to the habitual residence of a party. It was understood at the same time that the decision was not intended to preclude the possibility that undertakings issued from a habitual residence would fall within the draft Convention.

Article 2. Definitions

190. A proposal was made to add a cross-reference to article 15 so as to make it clear in article 2 that the draft Convention did not deal with undertakings that provided for oral demands for payment. The Commission decided, however, to maintain article 2 without any changes on the basis that the reference to "other documents" made it clear that a demand had to be in documentary form, on the understanding that article 2 was merely intended as a scope-of-application provision with the details of the other elements to be found in the substantive portions of the text.

Article 6. Definitions

191. The Commission agreed to reformulate subparagraph (f) along the following lines: "'confirmer'" means the person adding a confirmation to an undertaking". It did not support a suggestion that the definition refer to "issuance" of a confirmation.

Article 12. Expiry

192. The Commission decided, in subparagraph (b), to replace the words "... when the guarantor/issuer is informed that the act or event has occurred ..." by the words "... when the guarantor/issuer is advised that the act or event has occurred ...".

193. The Commission decided to accept the addition in subparagraph (c) of the words "and an expiry date has not been stated in addition" to the reference to non-occurrence of an expiry event. That addition, which had been referred to the drafting group, was intended to make it clear that the provision did not cover the case in which an undertaking referred to both an expiry event and an expiry date (see above, para. 90).

Article 16. Examination of demand and accompanying documents

194. The Commission agreed that it would be sufficient in paragraphs (1) and (2) to utilize the expression "any accompanying documents", rather than "any other, accompanying documents", when referring to the possibility that a demand, which under the draft Convention would itself have to be in documentary form, might be required to be accompanied by documents.

Article 19. Exception to payment obligation

195. The Commission accepted the proposal of the drafting group to formulate the title as reflected above.

196. The question was posed to the Commission by the drafting group whether to refer in paragraph (3) to the principal/applicant having a right to "obtain" or rather to "seek" a provisional court order in accordance with article 20. It was decided that the intent of the provision that a substantive right was being affirmed would be better conveyed by a formulation utilizing the words "... the principal/applicant is entitled to provisional court measures in accordance with article 20".

197. The Commission declined to accept a proposal to delete the reference at the beginning of paragraph (3) linking availability of such court measures to the instances set out in subparagraphs (a), (b) and (c) of paragraph (1) of article 19. It affirmed that the reference was useful to make it clear that the entitlement of the principal/applicant recognized in paragraph (3) was limited to those instances and thus could not exceed under the draft Convention what would be available under article 20, which was itself limited to the instances referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19. The proposal to delete the reference in paragraph (3) to paragraph (1) had been offered with a view to avoiding the risk of a misinterpretation that the reference in paragraph (3) to paragraph (1), which included in its chapeau the manifest-and-clear test, could engender a conflict with the "high probability" test referred to in article 20 (1). In order to limit the possibility of such a misinterpretation, the Commission decided to formulate the reference as precisely as possible to the instances referred to in the subparagraphs of paragraph (1) themselves, so as to avoid suggesting that the reference was also to the manifest-and-clear test in the chapeau of paragraph (1).

Article 22. Determination of applicable law

198. In line with the deliberations that had taken place in connection with the report of the drafting group on article 1 (see above, paras. 187 to 189), the Commission decided not to include in article 22 a reference to habitual residence.

D. Procedure for adopting the draft Convention as a convention

199. After completing its work on the draft Convention, the Commission considered the procedures that might be followed for the adoption of the text as a convention. The Commission supported a proposal to recommend that the General Assembly adopt the draft Convention in its current form and open it for signature. In support of that proposal, it was stated that the draft Convention would make a significant contribution to the practice of independent bank guarantees and stand-by letters of credit. It was further stated that the expense of convening a diplomatic conference would not be justified since the text was the result of many years of work at the end of which balanced solutions had been arrived at that successfully merged in a single text concepts and procedures from independent guarantee and stand-by letter of credit practice and from different legal systems, and thus did not require extended consideration of substance.

200. The Commission expressed its appreciation to the Working Group on International Contract Practices for having produced a draft Convention of such high quality. The Commission also expressed its appreciation to Jacques Gauthier (Canada), who served as Chairman of the Working Group during the preparation of the draft Convention.

E. Decision of the Commission and recommendation to the General Assembly

201. At its 564th meeting on 12 May 1995, the Commission adopted by consensus the following decision:

"The United Nations Commission on International Trade Law, Recalling that at its twenty-second session in 1989 it decided to prepare uniform legislation on independent guarantees and stand-by letters of credit, and that it entrusted the Working Group on International Contract Practices with the preparation of a draft,

Noting that the Working Group devoted eleven sessions, held from 1990 to 1995, to the preparation of the draft Convention on Independent Guarantees and Stand-by Letters of Credit,

Having considered the draft Convention at its 547th to 564th meetings, held during its twenty-eighth session, in 1995,

Drawing attention to the fact that all States and interested international organizations were invited to participate in the preparation of the draft Convention at all the sessions of the Working Group and at the twenty-eighth session of the Commission, either as member or as observer, with a full opportunity to speak and make proposals,

1. Submits to the General Assembly the draft Convention on Independent Guarantees and Stand-by Letters of Credit, as set forth in annex I to the present report;

2. Recommends that the General Assembly consider the draft Convention with a view to concluding at the fiftieth session of the General Assembly, on the basis of the draft Convention approved by the Commission, a United Nations Convention on Independent Guarantees and Stand-by Letters of Credit."

III. DRAFT UNCITRAL MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

A. Introduction

202. At its twenty-fourth session in 1991, the Commission agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed, and that the Commission should undertake work in that field. The Commission agreed that the matter needed detailed consideration by a Working Group. 5/

203. Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session (January - February 1992) to identifying and discussing the legal issues arising from the increased use of EDI. At its twenty-fifth session (1992), the Commission considered the report of the Working Group (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (ibid., paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange. 6/

204. The Working Group on Electronic Data Interchange devoted its twenty-fifth to twenty-eighth sessions to the preparation of draft model statutory provisions (for the reports of those sessions, see A/CN.9/373, 387, 390 and 406), which it approved in the form of a draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication at the close of its twenty-eighth session (October 1994). The work of the Working Group was carried out on the basis of background working papers prepared by the Secretariat on possible issues to be included in the Model Law. Those background papers included A/CN.9/WG.IV/WP.53 (Possible issues to be included in the programme of future work on the legal aspects of EDI) and A/CN.9/WG.IV/WP.55 (Outline of possible uniform rules on the legal aspects of electronic data interchange). The draft articles of the Model Law were submitted by the Secretariat in documents A/CN.9/WG.IV/WP.57, 60 and 62. The Working Group also had before it a proposal by the United Kingdom of Great Britain and Northern Ireland relating to the possible contents of the draft Model Law (A/CN.9/WG.IV/WP.58).

205. With a view to providing guidance to legislatures that might consider enacting the Model Law, the Working Group agreed that a draft guide to enactment of the Model Law should be prepared by the Secretariat. The draft Guide to Enactment of the Model Law prepared by the Secretariat (A/CN.9/WG.IV/WP.64) was considered by the Working Group at its twenty-ninth session (February - March 1995). After discussion, the Working Group requested the Secretariat to prepare a revised version of the draft Guide reflecting the decisions made by the Working Group and taking into account the various views, suggestions and concerns that had been expressed at its twenty-ninth session. At that session, the Working Group also considered proposals by the International Chamber of Commerce (A/CN.9/WG.IV/WP.65) and the United Kingdom (A/CN.9/WG.IV/WP.66) relating to the possible inclusion in the draft Model Law of additional provisions to the effect of ensuring that certain terms and conditions that might be incorporated in a data message by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data message (for the report of the twenty-ninth session of the Working Group, see A/CN.9/407).

206. The text of the draft Model Law as approved by the Working Group at its twenty-eighth session was sent to all Governments and to interested international organizations for comment. The comments received were reproduced in document A/CN.9/409 and Addenda 1 to 4.

207. The text of the draft articles of the Model Law as presented to the Commission by the Working Group was contained in the annex to document A/CN.9/406.

B. Consideration of draft articles

TITLE OF DRAFT MODEL LAW

208. The title of the draft Model Law as considered by the Commission was as follows: "Draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication". It was recalled that the Working Group had decided to cover EDI and related means of communication, as indicated in paragraph (a) of article 2 of the draft Model Law. It was also recalled that, in order to reflect its decision not to deal with all legal aspects of electronic communications, the Working Group had decided that use of the words "legal aspects" was preferable to the use of the words "the legal aspects".

209. There was agreement in the Commission that the title of the draft Model Law in general was too long, and did not describe the content of the draft Model Law with sufficient clarity. As to the particular words used in the title, a number of concerns were expressed. One concern was that the words "model law on legal aspects" were redundant and too vague for the title of a legislative text. Alternatively, those words were said to create the mistaken impression that the text dealt with all the legal issues that might be related to the use of EDI. Another concern was that the words "Electronic Data Interchange" were not sufficiently clear. It was said that the word "data" was particularly narrow and unclear to be included in a legal text, since it could be understood as a reference to any information in a computer or as a reference to information fields in EDI messages. Another concern was that the words "related means of communication" could be understood to refer to a broad scope of activities that the draft Model Law was not intended to cover. Yet another concern was that the word "communication" was felt to be too narrow, and appeared to be inconsistent with the decision of the Working Group to cover data messages that were created and stored but not communicated.

210. Various proposals were made aimed at addressing those concerns, while reflecting the common understanding that the title should be short, user-friendly and descriptive of the actual scope of the draft Model Law. Those proposals included: "Model Law on EDI", "Model Law on Electronic Commerce", "Model Law on Electronic Communications" and "Model Law on Electronic Means of Communication".

211. None of those proposals attracted sufficient support. In opposition, it was pointed out that: the first proposal was too narrow and unclear since the draft Model Law was intended to cover activities that went beyond EDI, as was clearly indicated in paragraph (a) of article 2 of the draft Model Law; the second proposal raised questions relating to the scope of application of the draft Model Law, since it appeared as restricting the scope of the draft Model Law to commercial activities, while the intention was to allow enacting States to apply the draft Model Law to a wider range of activities in which modern communication technologies were being used; in addition, the second proposal was said to be inconsistent with the provisions of the draft Model Law, since it focused on the content of data messages and not on the procedure of creating, storing or communicating data messages; the third proposed wording could be misunderstood in some countries as addressing regulatory rules of communications, e.g., in the field of broadcasting; and the fourth proposal, which was made in order to address the latter objection, was similarly unclear.

212. After discussion, the Commission postponed its final decision with respect to the title of the Model Law. It was agreed that the issue would need to be reverted to after the Commission had completed its review of draft articles 1 and 2.

CHAPTER I. GENERAL PROVISIONS

Footnote to chapter I

213. The text of the footnote to chapter I as considered by the Commission was as follows:

> "* This Law does not override any rule of law intended for the protection of consumers."

214. The Commission found the substance of the footnote to be generally acceptable.

Article 1. Sphere of application

215. The text of the draft article as considered by the Commission was as follows:

> "Sphere of application**
>
> "This Law forms part of commercial*** law. It applies to any kind of information in the form of a data message.
>
> ---
>
> " ** The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:
>
> > "This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce.
>
> "*** The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."

216. Divergent views were expressed as to whether the draft Model Law should be limited in scope to address only situations where EDI and related means of communication were used in the context of "commercial" or other "trade-related" relationships. One view was that any reference to "commerce" or "trade" should be avoided. In support of that view, it was stated that such a reference might raise difficulties, since certain common law countries, as well as certain civil law countries, did not have a discrete body of commercial law, and it was not easy or usual in such countries to distinguish between the legal rules that applied to "trade" transactions and those that applied more generally. Other examples were given of countries where notions such as "trade" and "commerce" were not commonly used in legal texts and might raise questions as to their definitions. It was also stated that the focus of the draft Model Law should not be on any specific category of transactions, e.g., commercial transactions in the context of which various computer-based techniques might be used, but rather that it should be on those techniques themselves, whose common feature was that they were not paper-based. It was further stated that, should the draft Model Law apply only to commercial transactions, such a limitation in scope would be inconsistent with the broad formulation of draft articles 5 to 9, which were intended to provide alternative ways of complying with existing requirements of national law. It was suggested that the scope of the draft Model Law should cover the full scope of such national requirements, not all of which were intended to apply only in a commercial context.

217. The contrary view, which was widely supported, was that the draft Model Law should somehow be limited in scope to data created, stored or exchanged in the context of commercial relationships. It was stated that such a limitation would appropriately reflect the general mandate of the Commission with respect to international trade law. It was also stated that the draft Model Law had been prepared against the background of trade relationships and might not be appropriate for other kinds of relationships. It was recalled that the same concern had been expressed during the preparation of the draft Model Law by the Working Group (A/CN.9/406, paras. 81 to 83; A/CN.9/390, paras. 23 to 26), and that the Working Group had decided that the focus of the text should not be on the relationships between EDI users and public authorities (A/CN.9/390, para. 21). It was also recalled, however, that no decision had been made to render the draft Model Law inapplicable to such relationships.

218. After discussion, the Commission decided that the draft Model Law should somehow be limited in scope to the commercial area. It was also decided that nothing in the draft Model Law should prevent an implementing State from extending the scope of the draft Model Law to cover uses of EDI and related means of communication outside the commercial sphere, and that the option thus given to implementing States should be clearly expressed in the draft Model Law. As to how the limitation to the commercial area and the option given to implementing States should be formulated, it was generally felt that the current formulation of draft article 1 was inappropriate. In particular, the reference to "commercial law" was found to be inadequate. A term of art in certain countries, the notion of "commercial law" might be meaningless in other countries. Furthermore, where the notion of "commercial law" was already in use in national legislation, it might be subject to a variety of definitions and might be interpreted differently according to the country in which the notion was used. It was generally felt that the reference to "commercial law", while providing a degree of flexibility to certain implementing States, might introduce considerable uncertainty and run counter to harmonization of international trade law. Wording along the following lines was proposed as a substitute for draft article 1: "This law applies to any kind of information in the form of a data message used in the context of commercial activities". It was also proposed that a footnote to draft article 1 should expressly allow implementing States to extend the scope of the draft Model Law to other types of situations if they so wished. After discussion, the proposal was adopted by the Commission and referred to the drafting group.

Footnotes to article 1

219. The Commission found the substance of the two footnotes to be generally acceptable.

Article 3. Interpretation

220. The text of draft article 3 as considered by the Commission was as follows:

> "(1) In the interpretation of this Law, regard is to be had to its international source and to the need to promote uniformity in its application and the observance of good faith.
>
> "(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

Paragraph (1)

221. The Commission considered the question whether paragraph (1) should be changed in order to refer to the purpose of the draft Model Law to facilitate the use of electronic data interchange and analogous means of communication in commercial transactions.

222. In support of that proposal, it was pointed out that including in paragraph (1) a statement as to the purpose of the draft Model Law to facilitate the use of EDI would be seen as encouraging the use of communication technologies. It was added that that result could not be attained if such a statement were to be included in the Guide to Enactment or in a preamble to the draft Model Law. In opposition to the proposal, it was stated that a reference to the purpose of the draft Model Law in paragraph (1) could lead to inconsistency since good faith might lead to an interpretation of the draft Model Law that did not necessarily facilitate the use of EDI. In addition, it was said that a statement regarding the purpose of the draft Model Law in paragraph (1) could be seen as mandating the use of electronic communications, while the intention was merely to remove obstacles in the use of such communications. After discussion, the Commission adopted the substance of paragraph (1) unchanged.

Paragraph (2)

223. The suggestion was made that the work of other international organizations in the field of EDI should be recognized by adding at the end of paragraph (2) language along the following lines: "there can also be taken into account rules formulated by international organizations for use in an electronic environment and, where appropriate, usages of trade and system rules". In support of the proposal, it was stated that EDI would be facilitated if courts were allowed to consider usages and other rules of practice in filling gaps possibly left by the Model Law. In addition, it was pointed out that it would be consistent with the practice followed in contemporary international legal instruments to include such a rule aimed at the harmonization or uniform interpretation of national laws.

224. The suggestion, however, did not attract sufficient support. A number of concerns were expressed. One concern was that a reference to rules of international organizations in general would introduce some uncertainty into the draft Model Law since the term "rules" would include contractual rules and the term "organizations" would include private organizations often representing special interests, such as interests of intermediaries. Another concern was that, in the context of a model law that would be enacted as domestic law, it would not be appropriate to subject gap-filling to international rules of practice and usages. After deliberation, the Commission adopted the substance of paragraph (2) unchanged.

CHAPTER II. APPLICATION OF LEGAL REQUIREMENTS TO DATA MESSAGES

Article 4. Legal recognition of data messages

225. The text of draft article 4 as considered by the Commission was as follows:

> "Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message."

226. The view was expressed that draft article 4 was superfluous since the principle of non-discrimination against data messages was already embodied in draft articles 5 to 8, and adding a general rule could only create confusion as to the purpose of those draft articles. It was suggested that, should a general statement along the lines of draft article 4 be regarded as necessary, it should be explained in the Guide to Enactment of the Model Law that article 4 stated the fundamental principle of non-discrimination, and was not intended to override articles 5 to 8 of the Model Law. However, the prevailing view was that a general provision stating the fundamental principle that data records should not be discriminated against was essential. It was widely felt that such a principle should find general application and that its scope should not be limited to evidence or other matters covered in draft articles 5 to 8. There was wide support for the proposal to explain the purpose of draft article 4 in the Guide to Enactment of the Model Law.

227. As to the precise formulation of draft article 4, a number of concerns were raised. One concern was that in its current formulation draft article 4 could be misinterpreted as suggesting that data messages were inherently unreliable. In order to alleviate that concern, the suggestion was made that draft article 4 should be cast in a positive way. Another concern was that draft article 4 did not make it clear that requirements for particular formalities were not affected where the inevitable and automatic consequence of using a data message was that the requirement was not satisfied. Yet another concern was that draft article 4 was based on the misconception that information had legal effectiveness, while it was data messages to which legal effectiveness was attributed. In order to address those concerns, the suggestion was made that draft article 4 should be amended along the following lines: "The use of a data message to record or communicate information shall not affect the legal consequences of the record or communication or of what is recorded or communicated, provided that no particular requirement applies which the use of a data message does not satisfy." The suggestion did not gain sufficient support. After deliberation, the Commission adopted the substance of draft article 4 unchanged.

Article 5. Writing

228. The text of the draft article as considered by the Commission was as follows:

> "(1) Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference.
>
> "(2) The provisions of this article do not apply to the following: [...]."

Paragraph (1)

General remarks

229. A concern was expressed that paragraph (1) might create some uncertainty since it contained notions (e.g., "rule of law" and "accessible so as to be usable for subsequent reference") the meanings of which were not clear. It was suggested that well-known notions, such as "preservation of a record of the information" and "reproduction in tangible form", would be preferable. It was proposed that paragraph (1) should be redrafted along the following lines: "'Writing' means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form". It was stated that such wording would be more in line with article 1.10 (Definitions) of the UNIDROIT Principles of International Commercial Contracts and existing international conventions such as the 1988 Convention on International Factoring prepared by the International Institute for the Unification of Private Law (UNIDROIT). While the view was shared that the notion of a record of the information being preserved might be useful in the context of providing background information in the Guide to Enactment of the Model Law, there was agreement that the terms used in paragraph (1) were widely known and understood in the field of EDI and related means of communications, and that the Commission should not shy away from using such terms.

230. In the context of the general discussion, a proposal was made that a reference to the accuracy and reliability of the information contained in a data message should be introduced as an element of the functional equivalent of "writing". Formulations that were suggested for use as additional conditions included "integrity" or "reliability" and "faithfulness" of the data message in reflecting what was actually exchanged. That proposal did not attract sufficient support. It was recalled that the Working Group had discussed the matter extensively, and that it had been recognized that the question of integrity or reliability was a matter that went mainly to the evidential value or weight of the data message, a matter dealt with in draft article 8 and beyond

the scope of draft article 5, which was limited to defining what might be considered the equivalent of a piece of paper in an electronic environment (see A/CN.9/406, para. 97 and A/CN.9/390, paras. 91 and 92).

"Where a rule of law requires"

231. A concern was expressed that the reference to "a rule of law" in the opening words of draft article 5 (and in other articles of the draft Model Law) might be unclear, particularly as to whether the notion of "rule of law" was intended to encompass, beyond the requirements contained in statutory law, those legal requirements that might result from trade usages or practice, from judge-made law and from contractual stipulations.

232. With respect to legal requirements that might be derived from trade usages or practice, it was recalled that the Working Group had decided to delete the reference to such sources of law, which appeared in an earlier version of paragraph (1), on the grounds that: requirements derived from trade usages or practice would, in most instances, be regarded as contractual in nature and be subject to contrary agreement of the parties; and that exclusion of such requirements would not preclude enacting States from taking account of the particular needs of practice, as well as of differences in circumstances and understanding in different countries (see A/CN.9/390, para. 94). The Commission was generally in agreement with that decision of the Working Group. In that connection, a suggestion that the opening words of paragraph (1) should be replaced with the words "Where there is a requirement that" did not receive support, since it was regarded as opening too broadly the scope of article 5.

233. With respect to legal requirements that might be derived from judge-made law, it was generally felt that such requirements should be within the scope of article 5. Although in certain jurisdictions such requirements would normally be regarded as directly or indirectly derived from statutory rules, and would thus be covered by a general reference to the notion of "rule of law", it was pointed out that in certain legal systems the words "a rule of law" might be interpreted as meaning statutory rules only, and not judge-made rules. After discussion, it was agreed that, while there was no need to include a specific reference to judge-made law in the text of the Model Law, it should be made clear in the Guide to Enactment of the Model Law that such requirements were intended to be covered under the general reference to the notion of "rule of law".

234. With respect to legal requirements that might result from contractual stipulations, a view was that, since such requirements might be regarded as indirectly stemming from general principles of law under which contracts were binding as between the parties, they might be covered under the general notion of "rule of law". That interpretation did not receive support. It was generally felt that the words "a rule of law" clearly indicated that only statutory and case-law requirements of a writing were covered (see A/CN.9/360, para. 34). The view was expressed that the inclusion of contractual requirements in the scope of draft article 5 (or any other provision contained in chapter II) would defeat the purpose of draft article 10. It was recalled that an earlier version of draft article 10 had not been adopted by the Working Group for the reason that it defined too broadly the sphere of party autonomy under the Model Law. It was also recalled that the Model Law might, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. It was further recalled that such well-established rules were normally of a mandatory nature since they generally reflected decisions of public policy. At least in respect of the provisions contained in chapter II, the draft Model Law should be regarded as stating the minimum acceptable form requirement and should, for that reason, be regarded as mandatory, unless expressly stated otherwise. The Model Law should not be misinterpreted as allowing parties to derogate from mandatory rules adopted for reasons of public policy (see A/CN.9/406, paras. 88 and 89).

235. The Commission decided that the scope of article 5 (as well as that of other articles contained in chapter II of the Model Law) should be confined to rules of statutory and case law. Contractual stipulations should thus generally be regarded as outside the scope of the notion of "rule of law" under the Model Law. It was also decided that article 10 should not be misinterpreted as restricting the freedom of parties to

derogate from the provisions contained in chapter II, insofar as such contractual freedom might exist under applicable rules of national law. It was agreed that the matter might need to be further considered in the context of the discussion of draft article 10 (see below, paras. 272-273).

236. In that connection, it was suggested that further discussion might be needed as to whether the Model Law should provide a rule of interpretation for situations where contracts, especially those concluded prior to the entry into force of the Model Law, might create obligations to produce certain information "in writing", for example where parties had agreed that an amendment of their agreement or any notice should be in writing, without specifying the exact meaning of "writing". Various views were expressed as to what might constitute an appropriate rule to deal with such a situation. Under one view, providing that a data message would satisfy any such requirement of a writing would be in keeping with a general purpose of the Model Law, which was to facilitate the use of electronic means of communication. The contrary view was that providing that, in the absence of an agreement as to what might constitute "writing", an electronic communication would satisfy any contractual requirement of a writing might run counter to the will and interest of certain parties and might be unacceptable under the Model Law, since it was generally admitted that the Model Law should not impose the use of electronic means of communications. The Commission decided that the question might need to be further considered at a later stage.

237. A further concern that was expressed in connection with the use of the notion of "rule of law" in paragraph (1) was that the current wording might not allow for a distinction to be drawn according to the various purposes for which a requirement that certain information be presented in writing might be established. It was suggested that the scope of draft article 5 should be restricted to cover only the situations where a writing was required for evidentiary purposes, as opposed to situations where the written form was intended to play a warning function and should for that reason be maintained notwithstanding the provision contained in draft article 5. That suggestion did not attract sufficient support. It was stated that, whatever the purpose of any given requirement of a writing might be, enacting States would remain free to exclude certain situations from the scope of draft article 5 by listing those situations under paragraph (2).

"accessible"

238. A suggestion was made to clarify the meaning of the term "accessible" by including in draft article 2 a definition along the following lines: "accessible means available in a form in which it is capable of being displayed". The suggestion was objected to on the grounds that the meaning of the term "accessible" was sufficiently clear. It was recalled that the notion of "display" had not been adopted by the Working Group as an element of the definition of "writing", since it had been recognized that information in a data message might be capable of being processed by a machine but not of being displayed. The Commission was agreed that the notion of "accessibility" should be clarified in the Guide to Enactment of the Model Law. It was also agreed that the matter might need to be reconsidered in the context of the discussion of draft article 7, which relied on the notion of the information being "displayed to the person to whom it is to be presented", with a view to ensuring consistency with the formulation of draft articles 5 and 6 (see below, para. 252).

"a data message satisfies"

239. A concern was expressed that the words "a data message satisfies" could have the unintended effect that, in case a transaction was concluded orally and was only subsequently recorded in a data message, the subsequent data message could satisfy the writing requirement retrospectively. It was explained that when an oral transaction was subsequently put into writing, the written document could only be relied on as satisfying the requirement that the transaction had to be in writing as from the date that the written document was generated. In order to alleviate that concern, the suggestion was made to insert after the words "a data message" the words "generated at the relevant time", or, alternatively, to substitute the words "can satisfy" for the word "satisfies". That suggestion was objected to on the grounds that article 5 was not intended to deal with the question of the time as of which the requirement for a writing was satisfied, and that attempting

to address that matter might create more problems than it might solve. The Commission was agreed that the matter might need to be discussed in the Guide to Enactment of the Model Law.

240. After discussion, the Commission found the substance of paragraph (1) to be generally acceptable.

Paragraph (2)

241. The Commission found the substance of paragraph (2) to be generally acceptable.

Article 6. Signature

242. The text of the draft article as considered by the Commission was as follows:

> "(1) Where a rule of law requires a signature, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:
>
> > (a) A method is used to identify the originator of the data message and to indicate the originator's approval of the information contained therein; and
> >
> > (b) That method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.
>
> "(2) The provisions of this article do not apply to the following: [...]."

Paragraph (1)

Opening words and subparagraph (a)

243. A concern was expressed that, in their current formulation, the chapeau of paragraph (1) and subparagraph (a) did not address cases in which it was important to identify not the originator itself but the person acting on behalf of the originator, such as the director of a company acting on behalf of the company. It was stated that subparagraph (a), applied in combination with the definition of the originator contained in article 2, led to the identification of the originator as principal but not to the identification of the person who actually signed as an agent. In order to address that concern, the suggestion was made to change the chapeau of paragraph (1) and subparagraph (a) along the following lines:

> "(1) Where a rule of law requires the signature of any person, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:
>
> > (a) A method is used to identify that person in the data message as the originator or a person acting on its behalf, and to indicate that person's approval of the information contained therein; and".

244. While some support was expressed for that suggestion, the prevailing view was that the attempt to address in the draft Model Law agency matters beyond what was already envisaged in the definition of "originator" in draft article 2 might create more problems than it might solve. It was felt that, in view of the wide differences existing among the various legal systems regarding the issue of agency, the matter might be better left to applicable rules of national law.

Subparagraph (b)

245. While subparagraph (b) was found to be generally acceptable, a concern was expressed that there was some uncertainty as to the criteria to be used when assessing the reliability of the method used to identify the originator. The suggestion was made to add the following criteria to the list contained in the draft Guide to Enactment of the Model Law: "(i) the relative bargaining positions of the originator and the addressee in their choice of identification; (ii) the importance and the value of the information in the data message; (iii) the availability of alternative methods of identification and the cost of implementation; (iv) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and (v) the state of science and technology at the time the method was agreed upon."

246. While there was general agreement that criteria (ii) to (iv) were useful and should be mentioned in the Guide to Enactment of the Model Law, criteria (i) and (v) were objected to. It was stated that an attempt to measure the reliability of the method used to identify the originator on the basis of the bargaining positions of the parties would introduce some uncertainty, and could create problems of a commercial nature. As to the state of the science and technology, it was pointed out that its inclusion was not appropriate, since parties might not always choose to use state-of-the-art technology for cost or other reasons.

247. After deliberation, the Commission found the substance of paragraph (1) to be generally acceptable.

Paragraph (2)

248. The Commission found the substance of paragraph (2) to be generally acceptable.

Article 7. Original

249. The text of the draft article as considered by the Commission was as follows:

> "(1) Where a rule of law requires information to be presented in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:
>
> > (a) That information is displayed to the person to whom it is to be presented; and
> >
> > (b) There exists a reliable assurance as to the integrity of the information between the time when it was first composed in its final form, as a data message or otherwise, and the time when it is displayed.
>
> "(2) Where any question is raised as to whether subparagraph (b) of paragraph (1) of this article is satisfied:
>
> > (a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and
> >
> > (b) The standard of reliability required shall be assessed in the light of the purpose for which the information was composed and in the light of all the relevant circumstances.
>
> "(3) The provisions of this article do not apply to the following: [...]."

Paragraph (1)

250. A concern was expressed with respect to the provision contained in subparagraph (a) that, in order to satisfy a requirement that information be presented in its original form, the information should be "displayed to the person to whom it is to be presented". It was stated that such a reference to "display" ignored the reality that in many EDI systems the processing of data messages was automated with little or no human intervention. In such a situation, the data message might not be displayed to any person at all, and there would be no need for such a "display" requirement. A related concern was that a requirement to display information might raise the question whether the raw information (usually in the form of unintelligible machine language) or the processed and intelligible information in the form of the final data message should be displayed. It was suggested that the requirement that information should be displayed should be deleted.

251. A further concern was expressed that, if the purpose of subparagraph (a) was to make it clear that the display of information through an electronic device might be substituted for the presentation of information in paper documents required by law, then it would be more appropriate to use the same terminology as in draft article 5, where, in addressing the question of presentation of information in an EDI environment, the expression "accessible" was used instead of "display".

252. With a view to accommodating the above-mentioned concerns, it was stated that paragraph (1) was intended to deal with two distinct situations. One situation was one in which a rule of law required information to be "retained" in its original form. In that situation, there might be no need for the machine-readable information to be displayed. Another situation was one in which a rule of law required information to be "presented" in its original form, for example, in the context of judicial proceedings. In that situation, it would be essential that the information be capable of being displayed, for example, to a judge. It was proposed that paragraph (1) should be redrafted to address the two situations more specifically. It was also proposed that, in order to bring article 7 in line with article 5, the requirement that the information should be "displayed" should be replaced by a requirement that the information be "capable of being displayed". Wording along the following lines was proposed as a substitute for paragraph (1):

> "(1) Where a rule of law requires information to be presented or retained in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:
>
> > (a) There exists a reliable assurance as to the integrity of the information from the time when it was first composed in its final form, as a data message or otherwise; and
> >
> > (b) Where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented."

253. After discussion, the proposal was adopted by the Commission. As a matter of drafting, the Commission reaffirmed the decision taken by the Working Group at its twenty-eighth session to replace the word "composed" by the word "generated" (A/CN.9/406, para. 162), to ensure consistency with other provisions of the draft Model Law. The Commission also adopted a proposal that the notion of "display" should be further explained in the Guide to Enactment of the Model Law to assist readers in understanding the context in which it was used in the draft Model Law.

Paragraph (2)

254. A concern was expressed that the words "it was first composed in its final form" might create problems with regard to the application of paragraph (2). In an EDI environment, the same information could be recorded in different forms at one time, as well as at different times. In such an environment, a question might arise as to what "its final form" meant. It was generally felt that the Guide to Enactment of the Model

Law should address the point by illustrating how that subparagraph would operate in practice. After discussion, the Commission found the substance of paragraph (2) to be generally acceptable.

Paragraph (3)

255. The Commission found the substance of paragraph (3) to be generally acceptable.

Article 8. Admissibility and evidential value of data messages

256. The text of the draft article as considered by the Commission was as follows:

> "(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data message in evidence:
>
> > (a) On the grounds that it is a data message; or,
> >
> > (b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
>
> "(2) Information presented in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.
>
> "(3) Subject to any other rule of law, where subparagraph (b) of paragraph (1) of article 7 is satisfied in relation to information in the form of a data message, the information shall not be accorded any less weight in any legal proceedings on the grounds that it is not presented in its original form."

Title

257. It was suggested that, in the title of draft article 8, the word "value" should be replaced by the word "weight", which was said to be more appropriate for the concept referred to in the draft article. After discussion, the Commission adopted that suggestion.

Paragraph (1)

258. The Commission found the text of paragraph (1) to be generally acceptable. Various proposals of a drafting nature were made, namely, that the word "admission" be replaced by the word "admissibility", and that the word "grounds" be replaced by the words "sole ground". After discussion, those proposals were adopted by the Commission and referred to the drafting group.

259. A proposal that the words "in writing, signed or" be inserted after the word "not" did not receive sufficient support.

Paragraph (2)

First sentence

260. A proposal was made that the first sentence of the paragraph should be deleted. In support of the proposal, it was stated that the words "Information presented in the form of a data message shall be given

due evidential weight" might be misconstrued as providing a directive or otherwise restricting the freedom of courts as to how evidence should be evaluated. Another view was that the sentence was unnecessary as it merely stated the obvious. In response, it was pointed out that the sentence was necessary, as a policy statement, to emphasize in the context of evidentiary requirements the principle embodied in draft article 4, namely that data messages should not be discriminated against. It was generally felt that courts needed to be made aware that information presented in the form of data messages should be admitted as evidence. After discussion, the Commission found the substance of the first sentence to be generally acceptable. As a matter of drafting, it was agreed that the word "presented" should be deleted.

Second sentence

261. A proposal was made that the word "processed" should be inserted after the word "stored". In support of the proposal, it was stated that data messages were not only generated, stored and communicated, but that they were also processed. In response, it was stated that the concepts of messages being "generated" and "stored" sufficiently addressed the issue of the processing of data messages where processing was relevant. After discussion, the Commission did not adopt the proposal.

262. As a matter of drafting, it was suggested that the word "stored" should be replaced by the word "retained". Such a replacement, it was stated, would align paragraph (2) with other articles of the draft Model Law in which the word "retained" had been used. In response, it was pointed out that in certain parts of the draft Model Law, the notion of "retention" was used in a generic sense, e.g., in the context of legal requirements that information be "retained", while in other parts of the draft Model Law the notion of "storage" was used in a more technical sense, e.g., in the context of computer data being stored after processing. Rather than to adopt a general policy of alignment with regard to the words "store" and "retain", it was decided that it would be better to decide on the appropriate term after examining the context in which the word was used. The drafting group was requested to implement that decision. After discussion, the Commission found the substance of the second sentence to be generally acceptable.

Paragraph (3)

263. Various views were expressed with respect to paragraph (3). One view was that the opening words "Subject to any other rule of law" should be deleted, since paragraph (3) should establish a substitute for other "rules of law" that might be interpreted as discriminating against data messages. Another view was that the words "any less weight" should be replaced by a clear reference to paper-based original documents with a view to establishing parity of treatment for data messages that satisfied the requirements of paragraph (1) of draft article 7. The prevailing view was that paragraph (3) should be deleted altogether, since it was felt that the substance of paragraph (3) was already covered by the first sentence of paragraph (2).

Article 9. Retention of data messages

264. The text of the draft article as considered by the Commission was as follows:

> "(1) Where it is required by law that certain documents, records or information be retained, that requirement shall be satisfied by retaining data messages, provided that the following conditions are met:
>
> > (a) The information contained therein is accessible so as to be usable for subsequent reference; and

(b) The data message is retained in the format in which it was generated, transmitted or received, or in a format which can be demonstrated to represent accurately the information generated, transmitted or received; and

(c) Transmittal information associated with the data message, including, but not limited to, originator, addressee(s), and date and time of transmission, is retained.

"(2) An obligation of an addressee to retain information in accordance with paragraph (1) shall not extend to any part of such information which is transmitted for communication control purposes but which does not enter the information system of, or designated by, the addressee.

"(3) A person may satisfy the requirements referred to in paragraph (1) by using the services of any other person, provided that the above conditions are satisfied."

Opening words of paragraph (1) and subparagraphs (a) and (b)

265. The Commission found the substance of the opening words of paragraph (1) and the substance of subparagraphs (a) and (b) to be generally acceptable.

Paragraphs (1)(c) and (2)

266. Various concerns were expressed with respect to the substance of paragraph (1) (c) and paragraph (2). One concern was that, although paragraph (1) (c) contained a reference to "transmittal information" and not to "the transmittal information", it might be misinterpreted as creating an obligation to retain all of the transmittal information associated with a data message. It was pointed out that transmittal information was often voluminous and frequently contained elements that were not important for the identification of the message. It was recalled that the matter had been discussed by the Working Group at its twenty-eighth session, and that it had been stated at that time that imposing the retention of all the transmittal information associated with a data message would create a standard that was higher than most standards existing as to the storage of paper-based communications (A/CN.9/406, para. 69). It was generally felt that a clear distinction should be drawn between those elements of transmittal information that were important for the identification of the message and the very few elements of transmittal information referred to in paragraph (2) (e.g., communication protocols) which were of no value with regard to the data message and which, typically, would automatically be stripped out of an incoming EDI message by the receiving computer before the data message was processed by the information system of the addressee.

267. Another concern was that, as currently drafted, paragraph (1) (c) might be construed as creating an obligation that information regarding the identity of the originator and addressee of a data message, as well as the date and time of its transmission, be retained, irrespective of whether such information was, in fact, made available by the communication system as part of the transmittal information. Examples were given of communication systems that did not include the time and date of transmission as standard elements of transmittal information. In that connection, the view was expressed that it should be made clear that the elements of transmittal information listed in subparagraph (c) were meant as an illustration of the kind of information that should be retained, provided that such elements were readily available as part of the transmittal information associated with the data message. The contrary view was that the list contained in paragraph (1) (c) should not be regarded as merely illustrative but rather that it should state the minimal requirements to be met for draft article 9 to apply. It was stated that, in some jurisdictions where it was required by law that contracts be dated, it would be essential that the transmittal information required to be retained under paragraph (1) (c) include information relating to date and time of the transmission. The prevailing view was that paragraph (1) (c) should not attempt to establish a precise standard by listing individual elements of information to be retained.

268. Yet another concern was that paragraph (1) (c) might impose ambiguous obligations since the distinction between transmittal information and data records was not sufficiently clear. A further concern, in connection with paragraph (2), was that a reference to information "not entering" a given information system was inappropriate, since the concept of "entry" was unclear, and it might be difficult to provide evidence that information had not entered an information system.

269. With a view to alleviating some or all of the above-mentioned concerns, the following texts were suggested as possible substitutes for paragraph (1) (c):

(1) "Transmittal information associated with the data message is retained";

(2) "[Relevant] [Material] transmittal information associated with the data message is retained";

(3) "Information necessary to reproduce how the data message was transmitted is retained".

Such information includes identification of the originator and addressee(s) of the data message, and date and time of its transmission". It was further suggested that any reference to "relevant" or "material" transmittal information would make it necessary to explain, either in the Guide to Enactment of the Model Law or in a footnote to draft article 9, what might be regarded as constituting "relevant" or "material" transmittal information. The following explanation was suggested: "material transmittal information is constituted by information regarding the identification of the originator and addressee(s) of the data message, and the date and time of its transmission". After discussion, the Commission entrusted an ad hoc drafting party to redraft subparagraph (c) and paragraph (2). The text proposed by that ad hoc drafting party was as follows:

> "(c) Such information, if any, is retained as enables the identification of the origin of a data message and the date and time of its transmission or reception."
>
> "(2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be transmitted or received."

After discussion, the Commission adopted that proposal.

Paragraph (3)

270. The Commission found the substance of paragraph (3) to be generally acceptable. As a matter of drafting, it was agreed that the words "the above conditions" should be replaced by an express reference to subparagraphs (a), (b) and (c) of paragraph (1).

CHAPTER III. COMMUNICATION OF DATA MESSAGES

Article 10. Variation by agreement

271. The text of the draft article as considered by the Commission was as follows:

> "As between parties involved in generating, storing, communicating, receiving or otherwise processing data messages, and except as otherwise provided, the provisions of this chapter may be varied by agreement."

272. The view was expressed that the principle of party autonomy embodied in draft article 10 should not be limited in scope to chapter III, but that it should apply to the entire Model Law. In support of that view, it was stated that restricting the sphere of party autonomy in commercial relationships might be regarded as creating an obstacle to trade, thus limiting the acceptability of the Model Law. The only existing limitations to party autonomy in the commercial sphere, it was said, were to be found in mandatory rules of statutory law that were generally based on considerations of public policy and in the principle of privity of contract, under which an agreement concluded between parties should not affect the rights and obligations of third parties. It was suggested that a provision along the lines of draft article 10 should be moved to chapter I and extended to cover the entire scope of the Model Law. In addition, a second paragraph should be added to the current text, which might read along the following lines: "the agreement between the parties shall not affect the rights and obligations of third parties".

273. In response, it was stated that draft article 10 was not intended to limit the sphere of party autonomy in commercial relationships. Draft article 10 did not allow contractual derogations to the rules contained in chapter II for reasons already expressed in the context of the discussion of draft article 5 (see above, paras. 234 - 235), namely that the provisions of chapter II might, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. It was recalled that such well-established rules were normally of a mandatory nature since they generally reflected decisions of public policy. An unqualified statement regarding the freedom of parties to derogate from the provisions of the Model Law might thus be misinterpreted as allowing parties, through a derogation from the provisions of the Model Law, to derogate from mandatory rules adopted for reasons of public policy. It was stated that, at least in respect of the provisions contained in chapter II, the draft Model Law should be regarded as stating the minimum acceptable form requirement. That view was generally supported by the Commission, and the substance of draft article 10 was found to be generally acceptable.

274. It was widely felt, however, that the fact that draft article 10 was limited in scope to allow contractual derogations to the provisions of the Model Law only in the context of chapter III should not be misinterpreted as restricting freedom of contracts where it might be recognized by applicable rules of national law. For example, it was stated that in many countries contractual agreements regarding the form of commercial transactions would normally be regarded as valid as between the parties. In certain countries, contractual agreements regarding the admissibility and value of evidence, or regarding what might be regarded as an original document, would also be regarded as binding between the parties. In order to make it abundantly clear that the Model Law was not intended to affect the contractual freedom of the parties as recognized under applicable rules of national law, it was generally agreed that a second paragraph should be added to the current text of draft article 10. As to the text of that new paragraph (2), a suggestion was that it should read along the following lines:

> "(2) This article is not intended to deal with any right or obligation that might arise under other chapters of this Law or by virtue of other applicable law".

While considerable support was expressed in favour of that suggestion, it was felt that the reference to "other applicable law" should be avoided, since it might be misinterpreted as an attempt to establish a conflict-of-laws rule. After discussion, the Commission adopted the following wording: "Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II", and otherwise reserved the issue for subsequent discussion.

Article 11. Attribution of data messages

275. The Commission had before it the text of draft article 11 as approved by the Working Group, which was as follows:

"(1) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by the originator or by another person who had the authority to act on behalf of the originator in respect of that data message.

"(2) As between the originator and the addressee, a data message is presumed to be that of the originator if the addressee, by properly applying a procedure previously agreed to by the originator, ascertained that the data message was that of the originator.

"(3) Where paragraphs (1) and (2) do not apply, a data message is [deemed] [presumed] to be that of the originator if:

(a) The data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own; or

(b) The addressee ascertained that the data message was that of the originator by a method which was reasonable in the circumstances.

However, subparagraphs (a) and (b) do not apply if the addressee knew, or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

"(4) Where a data message is deemed or presumed to be that of the originator under this article, the content of the data message is presumed to be that received by the addressee. However, where transmission results in an error in the content of a data message or in the erroneous duplication of a data message, the content of the data message is not presumed to be that received by the addressee in so far as the data message was erroneous, if the addressee knew of the error or the error would have been apparent, had the addressee exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission.

"(5) Once a data message is deemed or presumed to be that of the originator, any further legal effect will be determined by this Law and other applicable law."

276. In view of the numerous concerns raised by Governments in their comments on draft article 11 (see A/CN.9/409 and Addenda 1, 3, and 4), a number of delegations submitted a joint proposal for a revised draft article 11. The revised text, which the Commission decided to consider as a basis for discussion was as follows:

"(1) A data message is that of the originator if it was communicated by the originator itself.

"(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by a person who had the authority to act on behalf of the originator in respect of that data message.

"(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

(a) In order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure for that purpose which was:

(i) Previously agreed by the originator; or

(ii) Reasonable in the circumstances; or

(b) The data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

"(4) Paragraph (3) shall not apply:

(a) After the addressee has received reasonable notice from the originator that the data message is not that of the originator; or

(b) In a case within paragraph (3)(a)(ii) or (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

"(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the content of the data message as received as being what the originator intended to transmit, and to act on that assumption.

"(6) Paragraph (5) shall not apply at any time when the addressee:

(a) Has been notified by the originator or knew that there were any errors in the process of transmission; or

(b) Should have known of any such error, had it exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission.

"(7) Each data message received by the addressee may be regarded as a separate data message unless it repeats the content of another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the repetition was a duplication, and not the transmission of a separate data message.

"(8) Any further legal effect of the data message shall be determined in accordance with the provisions of this Law and any other applicable law."

General remarks

277. Various concerns were expressed with respect to draft article 11 in general. One concern was that the provisions contained in draft article 11 were unnecessarily complex. Another concern was that draft article 11 unnecessarily deviated from well-established principles of the law of contracts, particularly with respect to the possibility for the originator of an erroneous message to notify the error to the addressee and to nullify the erroneous message. Yet another concern was that certain provisions of draft article 11, such as paragraphs (3) and (5) to (7), might well apply to electronic communications but would be meaningless in the context of communications by means of telegram, telex and telecopy, which were also included in the scope of application of the draft Model Law by virtue of the definition of data message contained in draft article 2.

278. In response, it was stated that a set of provisions along the lines of draft article 11, while somewhat complex in appearance, was necessary in view of the lack of legislation to accommodate the issues raised by the use of electronic means of communication and in view of the uncertainty resulting from the lack of a single technical and administrative framework, such as provided by the postal service in the context of paper-

based communications. It was recalled that it was not the purpose of the Model Law to deviate from existing rules of the law of contracts. Draft article 11 was not intended to deal with the underlying transaction for the purpose of which data messages might be communicated, such as the formation of a contract or any other transaction, but rather to deal with the legal effectiveness of the communication process. As to whether all provisions of the Model Law would equally apply to telegram, telecopy and telex, it was widely felt that the issue might need to be discussed further in the context of the review of draft article 2.

New paragraphs (1) and (2)

279. It was noted that new paragraphs (1) and (2) were based on paragraph (1) of draft article 11 as approved by the Working Group at its twenty-eighth session. A concern was expressed that paragraph (1) duplicated the wording of the definition of the term "originator" contained in draft article 2. It was thus suggested that paragraph (1) should be deleted. That suggestion did not attract sufficient support. It was generally felt that paragraph (1) was useful in that it stated the principle that an originator was bound by a data message if it had effectively sent that message. After discussion, the Commission found the substance of new paragraphs (1) and (2) to be generally acceptable.

New paragraph (3)

280. It was noted that paragraph (3), which was based on paragraphs (2) and (3) of draft article 11 as approved by the Working Group at its twenty-eighth session, dealt with three kinds of situations, in which the addressee could rely on a data message as being that of the originator: firstly, situations in which the addressee properly applied an authentication procedure previously agreed by the originator; secondly, situations, in which the addressee properly applied a procedure which was reasonable in the circumstances; and thirdly, situations in which the data message resulted from the actions of a person who, by virtue of its relationship with the originator, had access to the originator's authentication procedures.

Opening words

281. A question was raised as to the difference between the words "is entitled to regard", which appeared in the opening words of new paragraph (3), and the words "is deemed", which were used in previous versions of the corresponding paragraphs of draft article 11. In response, it was stated that the difference was in the time period during which the assumption could operate. While the words "is deemed" implied an assumption without any time limitation, the words "is entitled to regard", read in conjunction with paragraph (4), were intended to indicate that the addressee could act on the assumption that the data message was that of the originator up to the point in time it received notice from the originator that the data message was not that of the originator, or up to the point in time when it knew or should have known that the data message was not that of the originator.

Subparagraph (a)

282. A number of concerns were expressed with regard to subparagraph (a) (ii). One concern was that, as a matter of policy, it would be inappropriate to provide, by way of the risk-allocating device contained in paragraph (3), that the addressee would be entitled to regard a data message as that of the originator even though the purported originator might never have sent that message, for example, in a case of fraud. Another concern was that subparagraph (a) (ii) introduced some uncertainty and put a heavy burden of proof on the addressee, who would have to prove what was "reasonable in the circumstances". Yet another concern was that subparagraph (a) (ii) failed to emphasize sufficiently that in all cases the basis of the originator's liability would be its relationship with the addressee. A further concern was that subparagraph (a) (ii) would be meaningless in the context of the use of such means of communication as telegram or telex.

283. Various suggestions were made to address those concerns. One suggestion was that subparagraph (a) (ii) should be deleted. Another suggestion was that, at the end of subparagraph (a) (ii), wording along the following lines should be inserted: "bearing in mind the relationship between the originator and the addressee". Yet another suggestion was that subparagraph (a) (ii) should be replaced by a provision that would set out the circumstances under which the purported originator could rebut the presumption that it had sent a given data message. While some support was expressed in favour of deletion of subparagraph (a) (ii), none of the suggestions attracted sufficient support. It was felt that subparagraph (a) (ii) was useful in that it addressed open-EDI situations, in the context of which data messages were exchanged in the absence of an interchange agreement. In addition, it was stated that the reference to "the circumstances" constituted sufficient reference to the relationship between the originator and the addressee.

Subparagraph (b)

284. The Commission found the substance of subparagraph (b) to be generally acceptable.

285. After discussion, the Commission adopted the substance of new paragraph (3). It was generally agreed, however, that the discussion of subparagraph (a) (ii) might need to be reopened in the context of the review of draft article 2.

New paragraph (4)

Subparagraph (a)

286. A number of concerns were expressed with regard to subparagraph (a). One concern was that the unintended effect of a notice being received under subparagraph (a) might be to relieve the originator from the consequences of sending a data message, with retroactive effect, irrespective of whether the addressee had acted on the assumption that the data message was that of the originator. Another concern was that subparagraph (a) could be interpreted as allowing the originator to avoid being bound by the data message by sending notice to the addressee under subparagraph (a), in a case where the message had, in fact, been sent by the originator and the addressee properly applied agreed or reasonable authentication procedures. It was thus proposed that subparagraph (a) should be deleted or, alternatively, that language along the following lines should be inserted at the end of the subparagraph: "unless the addressee provides evidence that the data message was sent by the originator". In response, it was stated that paragraph (4) was not intended to provide that receipt of a notice under subparagraph (a) would nullify the original message retroactively. It was generally felt that subparagraph (a) made it sufficiently clear that the originator was released from the binding effect of the message after the time notice was received under subparagraph (a) and not before that time. In addition, it was pointed out that, if the addressee could prove that the message was that of the originator, paragraph (1) would apply and not subparagraph (a) of paragraph (4). After discussion, the proposal was withdrawn by its proponents. It was agreed that the purpose of subparagraph (a) should be explained clearly in the Guide to Enactment of the Model Law.

287. Yet another concern was that the term "reasonable" qualifying the term "notice" introduced some uncertainty as its exact meaning was not clear. With a view to addressing that concern, a number of alternative terms were proposed, including "prompt", "immediate", "timely" and "sufficiently timely". In the same vein, the suggestion was made to delete the term "reasonable" and insert at the end of subparagraph (a) language along the following lines: "in time sufficient to allow the addressee to react". The Commission was agreed that the notice should be such as to give the addressee sufficient time to react, for example in the case of just-in-time supply where the addressee should be given time to adjust its production chain. It was agreed that the notion of "reasonable notice" needed to be adjusted to reflect the above discussion. It was also agreed that appropriate explanations should be provided in the Guide to Enactment of the Model Law.

Subparagraph (b)

288. A concern was expressed that subparagraph (b), applied in conjunction with subparagraph (a) (i) of paragraph (3), could lead to the inappropriate result that the addressee would be entitled to rely on a data message if it had properly applied the agreed authentication procedures, even if it knew that the data message was not that of the originator. With a view to addressing that concern, it was suggested to insert a reference to paragraph (3) (a) (i) in paragraph (4) (b). While some support was expressed in favour of the suggestion, it was widely felt that the suggested reference to paragraph (3) (a) (i) should not be inserted in paragraph (4) (b), since it was important to preserve the reliability of agreed procedures.

289. After discussion, the Commission adopted the substance of paragraph (4) and referred the adjustment to be made in subparagraph (a) to the drafting group.

New paragraph (5)

290. The Commission found the substance of new paragraph (5) to be generally acceptable.

New paragraph (6)

291. A number of concerns were expressed with respect to paragraph (6). One concern was that paragraph (6) in its new formulation might be read as unnecessarily deviating from similar provisions in international instruments, including the United Nations Sales Convention, in that it introduced the notion of notice. Another concern was that paragraph (6) did not make it sufficiently clear at what time notice had to be given. A related concern was that there appeared to be some inconsistency between paragraph (6), which provided that "paragraph (5) shall not apply at any time when the addressee: (a) has been notified ..." and paragraph (4) (a), which provided that "paragraph (3) shall not apply: (a) after the addressee has received reasonable notice ...".

292. With a view to addressing those concerns, a suggestion was made that paragraph (6) should be amended along the following lines: "Paragraph (5) shall not apply when the addressee knew or should have known that there were any errors in the process of transmission". In the same vein a suggestion was made that paragraph (6) should be turned into a second sentence of paragraph (5), which should read as follows: "The addressee is not so entitled when it knows or should know by exercising reasonable care or using any agreed procedure that the transmission resulted in any error in the content of the data message as it was received". In addition, it was suggested that paragraph (4) (b) should be aligned with the newly suggested wording of paragraph (5) to read as follows: "In a case within paragraph (3) (a) (ii) or (3) (b), when the addressee knows or should know by exercising reasonable care or using any agreed procedure that the data message is not that of the originator".

293. There was general support for the suggested change of new paragraph (6) into a second sentence of new paragraph (5). As to the precise formulation of the newly suggested paragraph (5), the question was raised whether the suggested change of the tense from past ("knew or should have known") to present ("knows or should know") indicated a change in substance. In reply, it was stated that the use of the present tense merely constituted an attempt to express in a more direct way the idea already contained in the text, namely that the addressee was entitled to rely on the data message up to the point of time it learnt that the message was not that of the originator. In order to clarify that point further, additional suggestions were made to replace the words "is not so entitled when it knows or should know" by the words "is not so entitled after it knows or should know", or with the words "shall cease to be so entitled when it knows or should know". Those additional suggestions did not attract sufficient support.

294. After discussion, the Commission adopted the substance of the proposal to make new paragraph (6) a second sentence of new paragraph (5) and referred it to the drafting group.

New paragraph (7)

295. It was noted that, in order to bring new paragraph (7) in line with new paragraph (5) as amended by the Commission, corresponding changes should be made to new paragraph (7), which should read as follows: "The addressee is entitled to regard each data message received as a separate data message and to act on that assumption unless it repeats the content of another data message and the addressee knows or should know by exercising reasonable care or using any agreed procedure that the repetition was a duplication, and not the transmission of a separate data message".

296. In reply to a question raised, it was stated that the words "is entitled to regard" indicated that the addressee had a choice to act on the assumption that the message was that of the originator or not. In that connection, a concern was expressed that the addressee might abuse that discretion to the detriment of the originator. It was pointed out that wording along the lines of paragraph (4) of draft article 11 as adopted by the Working Group at its twenty-eighth session was more appropriate. It was recalled that the earlier version of paragraph (4) had established a presumption that under certain circumstances a data message was that of the originator and provided that the presumption did not exist in case of errors in the content or erroneous duplications if the addressee knew or should have known about the errors. However, it was also recalled that the Working Group had not settled the question whether the presumption should be rebuttable or irrebuttable. The problem was said to be that: if the presumption were rebuttable and the originator were able to rebut it, the addressee would be left without protection in that it would be bound by the erroneous message, irrespective of whether it knew that it was erroneous or not; and, if the presumption was irrebuttable, the addressee would be protected in that the originator could not rebut it arguing that the message was erroneous.

297. Another concern was that new paragraph (7) failed to address the question whether the addressee was entitled to damages in case the originator sent an erroneous duplication. It was stated that, by providing the addressee with an option to regard a duplicate message as a separate message, new paragraph (7) might create conditions under which the addressee might unduly profit from the error of the originator. In order to address that concern, language along the following lines was proposed:

> "Where transmission results in the erroneous duplication of a data message, the addressee is entitled to regard this as a separate message unless:
>
> (a) The addressee knows or should know, or
>
> (b) The addressee was informed that the message was an erroneous duplication.
>
> In a case within subparagraph (b), the addressee is only entitled to damages caused by the erroneous duplication."

298. The suggestion was objected to on the ground that the question of damages should be left to applicable rules of national law. In addition, it was stated that draft article 11 as adopted by the Working Group at its twenty-eighth session did not deal with the question of damages. It was recalled that the Working Group at its twenty-sixth session had decided not to deal with the question of liability for damages (see A/CN.9/387, para. 127).

299. The Commission failed to achieve consensus on the substance of new paragraph (7). After discussion, it was decided that the substance of the new paragraph should be retained, together with the drafting changes suggested to bring that provision in line with new paragraph (5), and placed within square brackets, pending further discussion at the next session of the Commission in 1996. It was noted that, in view of the decisions made by the Commission with respect to new paragraphs (5) and (6), new paragraph (7) would need to be renumbered paragraph (6).

New paragraph (8)

300. It was stated that paragraph (8) was intended to express the principle that the attribution of authorship of a data message to the originator should not interfere with the legal consequences of that message, which should be determined by other applicable rules of national law. In support of that principle, it was stated that paragraph (8) was useful in that it signalled that (with possible exception, e.g., of draft articles 11, 12 and 13) the draft Model Law was not intended to affect other parts of trade law, such as the law on contracts or agency. One view was that the current text of paragraph (2), which was based upon a "deeming" approach, could have the effect of interfering with the operation of the law of agency when applied to a contractual relationship between the originator and the addressee.

301. While there was agreement on the principle embodied in paragraph (8), a number of concerns were raised with regard to its current formulation. One concern was that in its current wording paragraph (8) might give the contrary impression, namely that article 11 dealt with the legal effects of data messages. In order to address that concern, the suggestion was made that paragraph (8) should be either deleted, or retained and explained in the draft Guide to Enactment, or redrafted along the following lines: "This article does not determine whether the data message has any legal effect except insofar as might result from the attribution of the data message to the originator". A suggestion in the same vein was to redraft paragraph (8) along the lines of an earlier version of draft article 11, which read as follows: "Once a data record is deemed or presumed to be that of the originator, any further legal effect will be determined by this Law and other applicable law" (see A/CN.9/406, para. 131).

302. Another concern was that the words "and any other applicable law" introduced some ambiguity since they gave the impression that paragraph (8) was a conflict-of-laws rule. It was added that such a rule would be incomplete, since it did not set out the criteria for determining other applicable law, and inappropriate, since the draft Model Law, when enacted by States, would become part of their domestic law, which would provide how any other applicable law would be determined. In order to address that concern, the suggestion was made to delete paragraph (8), or at least the last words of paragraph (8). A related concern was that paragraph (8) appeared to be inconsistent with paragraph (2) of article 3, which provided that courts and arbitral tribunals should try to settle questions not expressly settled in the draft Model Law in conformity with the general principles on which the draft Model Law was based. In order to alleviate that concern, the suggestion was made to put paragraph (8) into a footnote along the lines of the second footnote allowing States to limit the applicability of the draft Model Law to certain legal effects of a data message.

303. After deliberation, the Commission decided to delete paragraph (8) and to explain in the draft Guide to Enactment the principle embodied therein.

C. Report of the drafting group

304. As the Commission concluded its discussion of draft articles 1 and 3 to 11, a drafting group established by the Secretariat proposed a draft revised version of articles 1 and 3 to 11 reflecting the deliberations and decisions that had taken place. A view was expressed that, instead of adopting articles 1 and 3 to 11 as revised by the drafting group, the Commission should only take note of those revised articles, pending a final decision as to the remainder of the articles of the draft Model Law. It was stated that a number of draft articles still needed to be discussed by the Commission and that consideration of those draft articles might lead to a reopening of the discussion that had taken place at the current session. After consideration of the report of the drafting group, the widely prevailing view was that, since articles 1 and 3 to 11 as revised by the drafting group appropriately reflected the deliberations and decisions of the Commission at its current session, they should be formally adopted by the Commission. The text of articles 1 and 3 to 11 as adopted by the Commission is reproduced in annex II of this report, which also reproduces the text of draft articles 2 and 12 to 14 as approved by the Working Group at its twenty-eighth session.

305. As to how the debate on the draft Model Law should be continued at the twenty-ninth session of the Commission in 1996, particularly with respect to articles 1 and 3 to 11, it was generally agreed that the Commission at its current session should not attempt to preempt the debate to be carried on at its next session. However, it was strongly advised that, with the exception of the few provisions on which the Commission had not come to a final conclusion at the current session, namely paragraph (2) of article 10 and paragraphs (3) (a) (ii) and (6) of article 11, provisions adopted by the Commission at its current session should be regarded as final, subject to any amendment that might become necessary as a consequence of the decisions to be taken by the Commission at its twenty-ninth session in 1996 with respect to draft articles 2 and 12 to 14.

D. Future work with respect to the draft Model Law

306. At the close of the discussion on draft article 11, the Commission noted that it had not completed its consideration of the draft Model Law and decided to place the draft Model Law, together with the draft Guide to Enactment of the Model Law, on the agenda of its twenty-ninth session to be held in New York in 1996. It was agreed that the discussion should be resumed at the twenty-ninth session of the Commission with a view to finalizing the text of the Model Law and adopting the Guide to Enactment at that session.

E. Future work in the field of electronic data interchange

307. The Commission noted that, at its twenty-seventh session in 1994, general support had been expressed in favour of a recommendation made by the Working Group at its twenty-seventh session that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the preparation of the Model Law had been completed. It was also noted that, on that basis, a preliminary debate with respect to future work to be undertaken in the field of electronic data interchange had been held in the context of the twenty-ninth session of the Working Group (for the report on that debate, see A/CN.9/407, paras. 106 to 118).

308. With regard to the scope of future work, one suggestion made at the twenty-ninth session of the Working Group was that the work should cover multimodal transport documents of title. Another suggestion was that, while work could include transport documents of title in general, particular emphasis should be placed on maritime bills of lading since the maritime transport area was the area in which EDI was predominantly practised and in which unification of law was urgently needed in order to remove existing impediments and to allow the practice to develop. The Working Group had come to the conclusion that future work could focus on EDI transport documents, with particular emphasis on maritime electronic bills of lading and the possibility of their use in the context of the existing national and international legislation dealing with maritime transport. After having established a set of rules for the maritime bills of lading, the Commission could examine the question whether issues arising in multimodal transport could be addressed by the same set of rules or whether specific rules would need to be elaborated.

309. After discussion, the Commission endorsed the recommendation made by the Working Group that the Secretariat should be entrusted with the preparation of a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents, taking into account the views expressed and the suggestions made at the twenty-ninth session of the Working Group with regard to the scope of future work and the issues that could be addressed. A number of other topics were suggested for inclusion in the study, including a report on the potential problems for the use of EDI in maritime transport under existing international instruments and a report on the work undertaken by other organizations in related areas of work. It was agreed that particular emphasis should be put in the study on work currently undertaken by other international organizations, such as the Comité Maritime International (CMI) or the European Union, and to the BOLERO project. In that connection, the view was expressed that work undertaken within CMI, or the BOLERO project, were aimed at facilitating the use of EDI transport

documents but did not, in general, deal with the legal effects of EDI transport documents. It was stated that particular attention should be given in the study to the ways in which future work by UNCITRAL could bring legal support to the new methods being developed in the field of electronic transfer of rights. The Commission expressed the wish that the requested background study, for the preparation of which the cooperation of other interested organizations such as CMI might be sought, would provide the basis on which to make an informed decision as to the feasibility and desirability of undertaking work in the area.

F. Re-engineering of WP.4

310. The Commission was informed of the "re-engineering" process being currently carried out within the Economic Commission for Europe with respect to the Working Party on Facilitation of International Trade Procedures (hereinafter referred to as "WP.4") of the Committee on the Development of Trade. It was recalled that the initial decision made by the Commission at its seventeenth session (1984), to place the subject of the legal implications of automatic data processing to the flow of international trade on its programme of work as a priority item, had been made after taking note of a report of WP.4, which suggested that, since the legal problems arising in that field were essentially those of international trade law, the Commission, as the core legal body in the field of international trade law, appeared to be the appropriate central forum to undertake and co-ordinate the necessary action. 7/

311. The Commission expressed its general concern with the possible implications of the "Final re-engineering report" published as document TRADE/WP.4/R.1104. That document, which stated that "topics falling under the auspices of WP.4 [included] modernizing legal procedures" (para. 19), suggested that the Economic and Social Council should recognize the proposed new Committee to be substituted for WP.4 as a result of the proposed "re-engineering" process as "the centre of competence for all of the United Nations" in the area of trade facilitation (para. 64). The terms of reference suggested for the proposed new Committee included "[facilitation of] international transactions, through the simplification and harmonization of procedures and information flows, thereby contributing to the growth of global commerce. To accomplish this general task, the Committee [should] in particular: review and analyze the procedures required to perform international transactions with a view to their reduction, simplification and harmonization; [...] develop recommendations to address legal issues and remove legal constraints to electronic trade transactions and electronic procedures; coordinate and, where relevant, harmonize the programme of work with other international organizations such as [...] UNCITRAL" (para. 72). As part of the suggested work programme for the proposed new Committee, "the following would be given high priority: [...] develop recommendations to address legal issues and remove legal constraints to electronic transactions and to electronic procedures" (para. 96).

312. The Commission reaffirmed its support of the work already accomplished by WP.4 in the technical field, particularly as regards the development of EDIFACT messages. It was generally agreed that the Commission should seek to establish closer cooperation with the community of EDI users represented in WP.4, with a view to furthering the development of legal rules adapted to the technical environment. However, the Commission concluded that, in view of the general mandate of UNCITRAL as the core legal body in the field of international trade law in the United Nations system, the above-mentioned proposals were not acceptable. The Commission requested the Secretariat to bring that conclusion to the attention of the Economic Commission for Europe.

313. The Commission noted that the proposed "Final re-engineering report" had not been adopted by WP.4 at its fifty-first session (March 1995) and that the development of the "re-engineering process" would be further considered by WP.4 at its fifty-second session (September 1995). The Commission requested the Secretariat to continue to monitor closely that process. It was generally agreed that the matter should be brought to the attention of the General Assembly, with a recommendation to reaffirm the role of the Commission as the core legal body in the field of international trade law. With respect to EDI and related

means of communication, the use of which was likely to affect the entire range of international trade relationships in the near future, it was generally felt that the Commission should play a central role with respect to the development of uniform rules specifically geared to solving the legal issues arising out of the use of such modern means of communication. Examples in point were the preparation of the UNCITRAL Legal Guide on Electronic Funds Transfers, the UNCITRAL Model Law on International Credit Transfers and the draft Model Law on Legal Aspects of EDI and Related Means of Communication. It was also felt that the Commission should play an equally important role with respect to the necessary process of adapting existing commercial law to the increased use of modern means of communication.

IV. INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction

314. The decision by the Commission to commence work on the project was taken at its twenty-sixth session in 1993. 8/ The first draft prepared by the Secretariat pursuant to that decision was entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (document A/CN.9/396/Add.1), which the Commission considered at its twenty-seventh session in 1994. 9/

B. Discussion of draft Notes on Organizing Arbitral Proceedings

315. The Commission noted that the project had attracted considerable attention among practitioners and that it had been discussed at several national and international meetings. The Commission expressed particular appreciation to the International Council for Commercial Arbitration (ICCA) for organizing a discussion of the project at the XIIth International Arbitration Congress, held by the Council at Vienna from 3 to 6 November 1994. The critical and favourable comments expressed at the Congress and other meetings were useful in preparing a thoroughly revised draft entitled "Draft Notes on Organizing Arbitral Proceedings" (doc. A/CN.9/410), which the Commission had before it at its current session. (For the conclusion of the Commission, see below, paras. 370 to 373).

1. Text as a whole

316. There was wide and strong support in the Commission for the project and for the purpose of the Notes, which was to serve as a reminder of questions relating to the conduct of arbitrations that, if circumstances so warranted, it might be useful to consider in order to facilitate the arbitral process. It was said that, by raising awareness about the need for proper organization of proceedings, the Notes would help avoid surprise and misunderstandings in arbitral proceedings and make the proceedings more efficient. While the advice given in the Notes might be useful in international as well as domestic arbitration, the text would be of particular importance in international cases, in which the participants often had different legal backgrounds and different expectations relating to the conduct of arbitrations. Furthermore, the text would provide welcome assistance to less experienced practitioners.

317. There was general approval for the principles that had been borne in mind in preparing the draft, among which were the following: the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; it was necessary to avoid establishing any requirement beyond the existing laws, rules or practices, and in particular it was necessary to ensure that the sole fact that the Notes, or any part of them, were disregarded would not lead to a conclusion that any procedural principle was violated; the Notes should not seek to harmonize disparate arbitral practices or recommend using any particular procedure.

318. However, strong reservations were also expressed about the project. It was said that experienced arbitrators did not need the advice in the draft Notes while those without sufficient experience could not rely on the Notes for sufficient guidance as to how to conduct arbitrations. Moreover, if the arbitral tribunal would present the Notes to the parties, that might lead to unnecessary discussions about matters relating to organizing proceedings; in addition, a party might invoke the Notes in order to insist on holding such discussions. Thus, the Notes might make arbitral proceedings lengthier, costlier and more complex.

319. The Commission, convinced of the usefulness of the Notes and desirous of avoiding difficulties or misunderstandings that were feared, embarked on a review of the draft text, bearing in mind the purpose of

the Notes and the stated underlying principles. It was said, in particular, that, by not leaving any doubt that the Notes did not diminish the prerogatives of the arbitral tribunal, the ability of the arbitral tribunal to conduct the proceedings flexibly and efficiently was undiminished.

2. Introductory part: "Purpose and origin of the Notes" (paras. 1 - 11 of the draft Notes)

320. It was observed that the substance of the table of contents of the Notes could serve as a checklist of matters to be borne in mind in organizing arbitral proceedings, and that a reference to such a checklist was made in paragraph 11 of the draft Notes. In order to highlight better such use of the table of contents, a suggestion was made to insert the checklist after paragraph 11.

321. As regards the introductory part, the following suggestions were made: to mention, possibly in paragraph 1, that the Notes could be used both in arbitrations administered by an institution and in non-administered arbitration; to recast paragraph 2 so as to avoid using the term "suggestions" and to state positively that the Notes did not establish any binding legal requirement on parties or arbitrators; that in some contexts the expression "administered arbitration" was unclear and that it was preferable to use instead an expression such as "arbitration administered by an institution"; to clarify that the Notes were prepared with a particular view to international arbitrations, while the text could be useful also in domestic arbitrations; it was pointed out, however, that some domestic arbitrations tended to be influenced to a greater degree than international arbitrations by practices and rules used in court proceedings and that therefore the draft Notes were not drafted to be directly relevant to domestic arbitration. While it was suggested to delete the second sentence of paragraph 2 as unnecessary, the opposing view was that the sentence was necessary to stress the non-binding nature of the Notes.

322. As to paragraph 4, it was suggested to delete the reference to "type and complexity of issues of fact and law"; to state expressly that the discretion of the arbitral tribunal in conducting the arbitral proceedings was subject to rules agreed by the parties and the law governing the proceedings, including the fundamental principles of procedure; that expressions such as "decisions on organizing proceedings" were preferable to "procedural decisions", used in paragraph 4 and elsewhere, inasmuch as the latter term might give rise to a controversy as to whether a matter was one of substance or procedure; to use, where appropriate, the term "procedural orders" as a term used in practice; to delete footnote 2 since, in referring to flexibility of proceedings, many other sets of rules, including those of arbitral institutions, could be given as examples; to add the word "just" to the words at the end of paragraph 4 so that they would read "the need for a just and cost-efficient resolution of the dispute".

323. It was suggested to emphasize, in the context of paragraphs 5 or 10 of the draft Notes, that it depended on the stage of the proceedings which of the organizational matters discussed in the Notes should usefully be raised and that care should be taken not to raise such matters prematurely.

324. A view was expressed that the statement in paragraph 6 about decisions made by the presiding arbitrator should be revised so as to express the limits to the prerogatives of the presiding arbitrator to decide alone. It was proposed to delete, in paragraph 6, the text after the first sentence, since it raised questions without answering them and since it dealt with potentially controversial matters. While that suggestion was opposed, it was proposed to reconsider the words "invite the parties to enter into a procedural agreement", which might give rise to controversy and delay, in particular if the invitation referred to agreement to a set of rules.

325. A suggestion was made not to mention in paragraph 7 the possibility of meeting at places other than the place of arbitration, since such freedom might be restricted by the applicable rules or law. There was opposition to that suggestion since the passage highlighted a method that might be necessary for an efficient

conduct of proceedings. It was considered that the substance of the first sentence of paragraph 8 should be expressed more clearly.

326. It was considered that paragraph 11, and the use of the word "agenda", might be misunderstood as implying that meetings devoted to procedural matters (referred to in paragraph 8 also as "preparatory conferences") were regularly held, which was not the case; furthermore, the significance of a checklist of procedural matters as set out in the Notes was not limited to preparatory conferences.

3. Procedural matters for possible consideration (paras. 12 - 92 of the draft Notes)

Deposits for costs (item 1)

327. It was considered that a deposit for costs was often not the very first matter that the arbitral tribunal raised with the parties and that, therefore, it would be more appropriate to place the item later in the Notes, perhaps close to items 4 and 5 ("Place of arbitration" and "Administrative services").

Set of arbitration rules (item 2)

328. One suggestion was to delete item 2 since a discussion concerning the choice of arbitration rules might give rise to controversy or lengthy discussions. In addition, an agreement on a set of rules of an arbitral institution without the case being administered by that institution would require some rules to be modified, in particular the rules that gave a function to an organ of the institution (e.g., as regards the challenge of an arbitrator or other functions of supervision by the institution). Such a modification presented a complex task; if the rules were left unmodified, however, problems difficult to solve might arise during the proceedings.

329. The opposite proposal was to keep the item and even to strengthen the effect of the second sentence of paragraph 15 by deleting the words of caution in the third sentence.

330. While there was considerable support for keeping the item, including the third sentence, several suggestions were made for additional clarifications: that an agreement on a set of arbitration rules was not a necessity and that the fact that the parties did not agree on a set of rules did not prevent the arbitral tribunal from proceeding with the case on the basis of the law governing the arbitral procedure; that, because of possible difficulties in cases when the parties agreed on rules of an institution (see above, para. 328) it was better to delete the reference to "another set of rules" in the example within the parentheses, or, alternatively, to state that it was advisable to agree on a set of rules for arbitration that was not administered by an institution.

331. The last suggestion was objected to on the ground that the modified text would appear to favour holding arbitrations that were not administered by an institution, for which there was no justification.

332. Bearing in mind the objection, it was suggested that the first two sentences of paragraph 15 should be replaced by wording along the following lines: "Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration begins. If that occurs, the UNCITRAL Arbitration Rules might be used without modification. In the alternative, the parties might wish to adopt the rules of an arbitral institution. In that case, it would be necessary to secure agreement of that institution and to stipulate the terms under which the arbitration could be carried on in accordance with the rules of the institution."

333. While there was agreement in principle on the suggested text, two observations were made: that the revised item did not reflect the possibility of agreeing on a section of the UNCITRAL Arbitration Rules or on modifying those Rules; that the agreement of an arbitral institution was necessary only as regards the performance of certain functions by that institution and that the text might be clarified to reflect, with appropriate cautions, various other ways in which parties might utilize the rules of arbitral institutions.

334. It was reiterated that the proposed text did not reduce the need for keeping the words of caution contained in the last sentence of paragraph 15 and for clarifying expressly that, despite the lack of agreement on a set of arbitration rules, the arbitral tribunal remained able to determine, on the basis of the law governing the arbitral procedure, how the case would be conducted.

Language of proceedings (item 3)

335. It was observed that paragraph 17 appeared to imply that in principle all documents annexed to the statements of claim and defence had to be translated into the language of the proceedings, and that it required an express decision for a party to be able to present a document without a translation. It was suggested that a more neutral approach, such as the one expressed in article 17 (2) of the UNCITRAL Arbitration Rules, should be adopted.

Place of arbitration (item 4)

336. It was suggested to delete the first sentence of paragraph 20 as unnecessary. The opposite view was that the sentence should be retained since it clarified the context in which the arbitral tribunal was to determine the place of arbitration. It was suggested that the word "typically" in the second sentence, in particular the corresponding word used in some other language versions, was either unclear or indicated that the power of the arbitral tribunal was limited, and that the word should be deleted. It was also suggested to mention that the parties might agree on a place of arbitration either directly or indirectly.

337. As to the list of factors possibly influencing the choice of the place of arbitration in paragraph 21, various suggestions were made: to place factors (a) and (b) (referring to the convenience of the participants and support services) at the end of the list; that factor (c) (the law on arbitral procedure) was the most important; that factor (d) (legal regime for enforcement of the award) should be placed first; that factor (c) ("perception of a place as being neutral") was unclear, potentially confusing and should be deleted; that the arbitral tribunal, before deciding on the place of arbitration, might wish to discuss that with the parties.

338. Citing the differing suggestions reflected in the preceding paragraph, and the difficulty of properly clarifying the interplay of the factors in the short discussion under item 4, it was suggested to delete paragraph 21. The prevailing view, however, was to keep it, since it usefully drew attention to the variety of factual and legal considerations in choosing a place of arbitration.

339. The proposal for deleting the second sentence of paragraph 22 was not adopted, since the sentence highlighted an important aspect of flexibility in the conduct of proceedings (see also above, para. 325).

Administrative services (item 5)

340. It was said that the references to various types of services were too detailed and might give rise to an impression that an arbitration was a major and expensive administrative exercise. It was pointed out that paragraphs 23 and 24 did not distinguish properly between the services that most arbitral institutions regularly provided (e.g., rooms for hearings and meetings) and services that were not always necessary or were often not provided by institutions, but were to be secured by the parties themselves (e.g., travel arrangements).

341. It was suggested to mention in paragraph 26 that the fees for the secretary appointed by an institution administering the case were normally borne by the institution, while in other cases such fees would typically form part of the arbitration costs and would be paid from the amount deposited to cover those costs.

342. It was proposed to delete the phrase "or if the secretary's tasks imply the presence of the secretary during the deliberations of the arbitral tribunal", because the presence of the secretary during the deliberations was in some parts of the world not controversial, in particular when the secretary was appointed by the arbitral institution administering the case; furthermore, even where the presence of a secretary raised concerns, they were quite different from the concern, mentioned in paragraph 27, that the secretary's tasks might not be clearly distinguishable from the tasks incumbent on the arbitrators.

Confidentiality (item 6)

343. A view was expressed that paragraph 28 should be modified so as to indicate more clearly that the arbitral tribunal was not merely a passive recorder of an agreement of the parties and that the arbitrators were also bound to respect the confidential nature of information concerning the arbitration. While confidentiality was widely viewed as an important advantage of arbitration over court litigation, there appeared to be possibly diverging expectations of parties as regards the extent of confidentiality, to which fact the attention of the reader of the Notes should be drawn.

344. Suggestions were made for simplifying and shortening the discussion in paragraphs 29 to 31.

345. A view was expressed that the way paragraph 29 was drafted might leave a wrong impression that electronic means of communication were more insecure than was in fact the case. A contrary view was that the paragraph properly reflected the nature of risks involved in electronic communications.

Routing of writings among parties and the arbitrators (item 7)

346. The following suggestions were made: to indicate that the examples given in paragraph 32 were examples only; to revise the order of the examples given; to cover also cases in which the arbitral tribunal directed a communication to one party only; to strengthen the suggestion about the advisability of a timely determination of the routing of writings; to indicate that, in the case of an arbitration administered by an institution, a system of routing writings would often be determined by the rules or practices of the institution; to clarify the second sentence so as to reflect better the actual practice; to refer to possible measures that might be taken to discourage refusals by a party to accept writings or use similar dilatory tactics.

Telefax and other electronic means of sending writings (item 8)

347. Recalling the observation on paragraph 29 of the draft Notes (above, para. 345), it was said that also paragraph 33 might leave a wrong impression that telefax was more insecure than was in fact the case, in particular in view of the widespread and increasing use of security devices built into communication systems. It was suggested that the paragraph should mention that the arbitral tribunal and the parties might consider which telefax messages should be confirmed by mailing or otherwise delivering the documents whose facsimile had been transmitted by electronic means.

348. It was suggested to reduce the overly detailed discussion in paragraphs 34 to 36 to several sentences. It was understood that the use of electronic means of communication depended on the agreement of those concerned.

349. In connection with time-limits for submission of writings, it was suggested to take into account the question of different time zones. It was also suggested to address the situation when the originator of a message had not received a confirmation of receipt.

Timing of written submissions (item 9)

350. It was considered that the expression "timing" (and in particular the corresponding word in some other language versions) in the title was misleading in that submissions were scheduled not only with reference to a calendar but also with reference to the stages of the proceedings.

351. It was suggested to add a paragraph indicating that different practices existed with respect to submissions which parties might present after the conclusion of the hearings (post-hearing submissions) and that, in view of those differences, guidance to the parties would be useful. In connection with that suggestion it was proposed to modify the title of item 9 along the lines of "Written submissions" or "[Arrangements for] [Exchange of] written submissions".

Practical details concerning written submissions and evidence (e.g., copies, numbering of items of evidence, references to documents, numbering of paragraphs) (item 10)

352. It was observed that the examples given in the title between the parentheses were necessary to make the title meaningful when it would appear in a checklist of matters for possible consideration (see above, para. 320). It was proposed to review other titles in that light.

353. It was thought by some that paragraph 40 described in excessive detail and gave too much prominence to matters that were petty and often of marginal significance. The paragraph might also signal to a non-experienced arbitrator a wrong sense of priority. Moreover, if the arbitral tribunal should refuse to accept a submission that did not comply with a technical arrangement mentioned in the paragraph, that might be considered a violation of procedural rights of that party. The Commission, however, adopted the view that it was useful to mention those practical details in the Notes, bearing in mind, and possibly expressing in the paragraph, that the Notes were not binding and that the arbitral tribunal should use its discretion in dealing with matters mentioned in the paragraph.

Defining points at issue (item 11)

354. As to paragraph 41, it was thought that an early fixing of a list of the points at issue might cause difficulties if later developments called for a revision of the list. The discussion in the paragraph was said to be reminiscent of requirements to define at an early stage of the proceedings the points at issue (or the terms of reference of the arbitral tribunal), which existed in some legal systems and in the practice of some arbitral institutions and which, as considered by some, caused problems in practice. It was considered that the paragraph should suggest that the arbitral tribunal should proceed flexibly in clarifying points at issue, bearing in mind the possibility that those points might change and that arbitration rules often had provisions as to how to deal with such changes. It was also suggested that it should be mentioned in the Notes that the "terms of reference", required to be drawn up under the rules of some arbitral institutions, served the same purpose as a list of points at issue. It was considered that, unless those amendments to the paragraph were to be made, it would be preferable to delete the whole item 11.

355. As to paragraph 43, it was suggested that it was unclear what the difference was between the "award" and the "decision", and that the use of the term "award" was preferable.

356. A suggestion was made to include a paragraph addressing the case where the arbitral tribunal considered that the relief or remedy sought by a party was insufficiently definite and the arbitral tribunal decided that it should be formulated more precisely (see also draft Guidelines for Preparatory Conferences in Arbitral Proceedings (A/CN.9/396/Add.1), "D. Defining issues and order of deciding them", remarks under (ii), and the consideration in the Commission on the point (A/49/17, para. 151)).

Possible settlement negotiations and their effect on scheduling (item 12)

357. No observations were made on the substance of the item.

Documentary evidence (item 13)

358. The substance of paragraphs 45, 46 and 54 received general support.

359. Suggestions were made for the deletion of paragraphs 47 to 49 because they were too detailed. Those suggestions were opposed on the ground that paragraphs 47 to 49 referred to practices that could result in substantial savings. Suggestions were also made to delete paragraphs 50 to 53, since they gave prominence to practices that were controversial or not acceptable in some parts of the world. Those suggestions were opposed on the ground that, because those practices differed widely and it was therefore necessary to avoid surprise and misunderstandings, the paragraphs clarified to the parties how requests for documents would be dealt with. The Commission, in the spirit of compromise and wishing to ensure the broadest acceptability of the Notes, decided to retain the substance of paragraphs 47 to 49, delete paragraphs 50 to 53 and limit the discussion of requests for documents to the substance of article 24 (3) of the UNCITRAL Arbitration Rules.

360. The following suggestions were made: that it might be useful to mention in paragraph 45 the possibility that court assistance would be needed in obtaining evidence (as envisaged, e.g., in article 27 of the UNCITRAL Model Law on International Commercial Arbitration); to clarify, in paragraph 47, that, with respect to the case under (b), the words "a party protests" meant a statement that the party had not received the communication; that paragraph 49 might refer to a possibility that evidence be presented by using computerized means.

361. It was considered that paragraph 50 should also reflect the practice according to which a party, instead of handing over a document to the other party, allowed that other party to inspect the document at the place where the document was kept. In addition, appropriate mention should be made of requests that a document be handed over to an expert or that the expert be given access to the document.

Physical evidence other than documents (item 14)

362. No observations were made on the substance of the item.

Witnesses (item 15)

363. Suggestions were made to delete paragraphs 61 and 62, since they were promoting practices according to which a party presenting a witness met the witness in private and helped the witness prepare the written statement. Those practices, in the view of many practitioners, compromised the credibility of the testimony, were frowned upon in various parts of the world, or might in some instances be contrary to law. The opposing view was that paragraphs 61 and 62 should be maintained, precisely because the opinions about the practices were so different; it was necessary to explain the various possibilities and leave to the applicable rules, law and wisdom of the arbitral tribunal to determine the manner of proceedings. The Commission decided that paragraphs 61 and 62 should be revised, reflecting that there were differing practices and that no practice should be preferred, and taking into account the above concerns.

364. It was considered that paragraph 63 should be deleted, because it dealt in a simplistic way with a question that affected fundamental rights of a party to present its case.

Experts and experts witnesses (item 16)

365. No observations were made on the substance of item 16.

Hearings (item 17)

366. A suggestion was made to reflect in paragraph 83 also the case in which a summary of oral statements and testimony was written by the secretary of the arbitral tribunal.

Multi-party arbitration (item 18)

367. It was suggested, and the Commission agreed, that paragraphs 87 and 88 should be deleted, since they did not deal with organizing arbitral proceedings. It was decided to delete also paragraph 89, since the separation of issues, as indicated in the paragraph, might present a complex task and raise difficulties concerning the respect of the rights of the parties, and since it was not possible to deal with those difficulties in the context of the Notes.

368. It was considered that the rather generally formulated paragraph 90 should not appear as a separate item, and that its substance should be included in another suitable place in the Notes.

Possible requirements concerning filing or delivering the award (item 19)

369. It was said that it was usually the winner in the dispute who had an interest in filing the award, that item 19 had little to do with organizing the proceedings, and that there was no need to say anything about the matter in the Notes. The Commission, however, adopted the view that the item was useful since different solutions existed as to how and by whom an award had to be filed, if it had to be filed at all, and since the parties might not be aware of such requirements.

C. Conclusion

370. The Commission, having completed the review of the substance of the draft Notes, requested the Secretariat to prepare, in light of the considerations in the Commission, a revised draft of the Notes for final approval by the Commission at its twenty-ninth session in 1996.

371. It was recalled that at its twenty-sixth session in 1993 the Commission postponed its decision as to whether work should be undertaken in the areas of multi-party arbitration and the taking of evidence in arbitration. 10/

372. As to multi-party arbitration, suggestions were made at the current session that it would not be promising to undertake work in that area because the great variety of possible multi-party situations did not lend itself to useful general solutions; it was also said that experience in other international organizations proved that meaningful results on the topic were elusive. Nevertheless, the Commission considered that the Secretariat should continue to monitor the law and practice in the field of multi-party arbitration so as to be able to present to a future session a document exploring the desirability and feasibility of work by the Commission in that field.

373. As to the taking of evidence in arbitration, it was observed that the discussions of the draft Notes on Organizing Arbitral Proceedings showed that practitioners in international commercial arbitration had different expectations as to how evidence in arbitration should be taken. Since those different expectations gave rise to difficulties in practice, it was thought that the Commission should study the desirability and feasibility of work in that area. The Secretariat was requested to prepare for a future session a document to serve as a basis for consideration by the Commission.

V. RECEIVABLES FINANCING

374. At its twenty-sixth session (1993), the Commission considered a note by the Secretariat containing a brief discussion of certain legal problems in the area of assignment of claims and of past and current work on assignment and related topics (A/CN.9/378/Add.3). The Commission then requested the Secretariat to prepare a study on the feasibility of unification work in the field of assignment of claims. 11/ In response to that request, the Secretariat presented to the Commission, at its twenty-seventh session (1994), a report on legal aspects of receivables financing (A/CN.9/397). The report focused on assignment effected for financing purposes (i.e., for raising income or credit) and suggested that a number of assignment-related problems could be addressed by a set of uniform rules that the Commission could prepare. At that session, the Commission requested the Secretariat to prepare a further study that would discuss in more detail the issues that had been identified and would be accompanied by a first draft of uniform rules. 12/

375. Pursuant to that request, the Secretariat submitted to the Commission, at its current session, a report discussing the possible scope of future work and a number of assignment related issues, and suggested some possible solutions to problems arising in the context of receivables financing (A/CN.9/412). The report contained preliminary drafts of uniform rules that were intended to highlight some of the questions and the possible answers thereto, so as to assist the Commission in determining the feasibility of future work on the topic. The report concluded that it would be both desirable and feasible for the Commission to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and the effects of such assignments on the debtor and other third parties.

376. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, the Hague Conference on Private International Law ("the Hague Conference"), the European Bank for Reconstruction and Development (EBRD), the International Bank for Reconstruction and Development (IBRD) and, in the United States of America, the National Conference of Commissioners on Uniform State Laws. Steps taken included the submission of a draft of document A/CN.9/412 to those organizations for comments and oral presentation of its final version to the UNIDROIT Governing Council at its recent meeting (Rome, 29 March to 1 April 1995). The Commission reaffirmed the need for active cooperation with all national and international organizations active in the field, including representatives of the relevant sectors, public and private, and the legal profession, who would be the end-users of any uniform law to be prepared by the Commission.

377. Wide support was expressed in the Commission for work on the topic. It was stated that the background reports submitted by the Secretariat in the last three years were a good starting-point for future work since they had identified a practical problem, with which international trade was faced due to the diversity of laws, and had presented some possible solutions. In addition, it was said that work by the Commission on assignment of receivables could facilitate international trade since assignment was one of the most important transactions in the financing of international trade. Moreover, it was pointed out that work by the Commission on assignment could usefully relate to its work on cross-border insolvency and build-operate-transfer (BOT) projects, since the problem of recognition and enforcement of cross-border assignments usually arose in case of insolvency of the assignor, and assignment of receivables was an integral part of BOT contractual schemes.

378. At the same time, a number of concerns were expressed. One concern was that any overlap or conflict with work already done in UNIDROIT (UNIDROIT Convention on International Factoring) or currently under way (draft UNIDROIT uniform rules on international interests in mobile equipment) should be avoided. Another concern was that the topic was a complicated one and should be studied further before it could be submitted to a working group. Yet another concern was that work on assignment might not

usefully contribute to the resolution of the crucial problem of priority among several claimants laying a claim to the assigned receivables, until the most likely solution, i.e. registration, had been considered further in the context of future work to be undertaken by the Commission on negotiability/transferability of rights in goods and by UNIDROIT on international security interests in mobile equipment. Deferral of work on assignment was also suggested in view of the incipient work on cross-border insolvency, on the ground that the assignment context presented one of the main problem areas in insolvency. Similarly, it was suggested that future work on BOT projects would necessarily raise questions of assignment of receivables. Moreover, the concern was expressed that the private international law aspects of assignment of receivables, which were raised in the report before the Commission and the draft uniform rules contained therein, were particularly complex and should not be dealt with, in particular by way of a possibly partial approach that might have the unintended effect of enhancing uncertainty instead of uniformity of law. In that connection, some doubt was expressed as to whether any uniform rules on assignment, without some private international law rules, would add anything to the already existing UNIDROIT Convention on International Factoring.

379. The prevailing view was that the Commission should assign the report and the draft uniform rules contained therein to a working group with a view to preparing a uniform law on assignment in receivables financing. It was emphasized that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role in the field of trade financing.

380. As regards the concern expressed as to potential duplication of efforts and overlap with the work of UNIDROIT, the observer of UNIDROIT stated that the project as now defined would not overlap or conflict with the UNIDROIT Convention on International Factoring, which in the meantime had entered into force on 1 May 1995 for France, Italy and Nigeria and was being considered for ratification by a number of other countries. With regard to the work of UNIDROIT on international security interests in mobile equipment, the observer of UNIDROIT pointed to the need for close cooperation, in particular in the field of registration systems, which was an important aspect of the work of UNIDROIT in that area of law. As to the private international law aspects of assignment, it was pointed out that the difficulty in addressing them should not result in their exclusion from future work of the Commission on the topic, but should rather lead to closer cooperation with the Hague Conference, for example, by the holding of joint meetings of experts on issues of common interest related to assignment of receivables.

381. As to the form that work by the Commission could take, while it was recognized that the matter would need to be addressed at a later stage when the detailed content of the uniform rules would be better known, the prevailing view at the current stage was in favour of preparing a model law. For example, it was stated that a model law might be a more suitable form of work in view of the wide divergences existing among legal systems and the complexity of the problems arising in the context of assignment in receivables financing. In that connection, it was stated that assignment took place in the context of complex financing transactions, about the economic aspects of which there might be a divergence of opinions in developed and developing countries. It was suggested that, if the Commission were to prepare a model law, a commentary could also be prepared discussing the various financing practices in the context of which assignment of receivables might take place, as well as the differences existing among the various legal systems in the area of assignment. As to the mandatory or non-mandatory nature of the uniform rules to be prepared, a view was expressed that the uniform rules to be prepared should include a general provision recognizing party autonomy.

VI. POSSIBLE FUTURE WORK

A. Cross-border insolvency

382. The Commission had before it a note by the Secretariat reporting on the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22-23 March 1995). The purpose of the Colloquium was to obtain for the Commission, as it embarks on work on cross-border insolvency, the views of judges and of Government officials concerned with insolvency legislation on the specific issue of judicial cooperation in cross-border insolvency cases, and the related topics of court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "judicial cooperation" and "access and recognition"). It had been decided at the last session that work by the Commission should focus, at least at the current stage, on those limited aspects. 13/ Participants at the Judicial Colloquium included 60 judges and Government officials from 36 States, representing a diversity of legal systems and experiences.

383. It was recalled that the Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners and other trade circles directly concerned with the problem. That proposal was made first at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", a proposal which the Commission decided at its twenty-sixth session in 1993 to pursue further. 14/ Subsequently, in order to assess the desirability and feasibility of work in that area and to define appropriately the scope of the work, the UNCITRAL-INSOL Colloquium (Vienna, 17-19 April 1994) was held, involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. That first UNCITRAL-INSOL Colloquium gave rise both to the suggestion that work by the Commission designed with the limited but useful goal of facilitating judicial cooperation and access and recognition would be desirable, and that a multinational meeting of judges would be a most meaningful step in further assessing the desirability, feasibility and scope of such work.

384. The participants at the Judicial Colloquium were aided in their discussion by a background report prepared by a group of experts assembled by INSOL. The report summarized the current legal environment, including obstacles that often stood in the way of judicial cooperation and access and recognition in cases of cross-border insolvency, due in particular to diversity of approaches among legal systems and in many cases to lack of adequate legislative frameworks for judicial cooperation and for access and recognition.

385. The report also described the legislative frameworks that did exist in a limited number of States specifically dealing with judicial cooperation and with access and recognition in the insolvency context, and that might serve to inspire in part future work by the Commission. Such legislation varied in the extent to which cooperation and assistance were mandatory or subject to the discretion of the requested court as regards both the questions of access and recognition and the degree of cooperation to be given. Also described were various techniques and notions employed in pursuit of judicial cooperation and access and recognition in the absence of a specific legislative or treaty framework.

386. The report made several recommendations, including, for example: that States should be encouraged to enact in their legislation some basic rules to apply in cases of cross-border insolvency; that an applicant for recognition should not be deemed to have submitted fully to the jurisdiction of the foreign country when appearing in connection with the insolvency; and that, upon recognition, such cooperation and assistance should be available as is not inconsistent with the law of the foreign country, with the relevant court being given the discretion to provide such aid and assistance as might be appropriate in the circumstances.

387. The Commission expressed its appreciation for the assistance that had been provided to date by INSOL, and welcomed the expression of willingness by INSOL to remain involved with and support work

by the Commission in the future, for example, INSOL's statement of its willingness to organize an additional judicial colloquium.

388. With the above report by way of general background information, a major portion of the Judicial Colloquium programme was devoted to presentations on six major cases of cross-border insolvency by judges from various countries and differing legal systems that presided over proceedings in some of those cases, as well as by insolvency administrators and other court-appointed insolvency officials that had been involved. The programme also included observations by leading academics in the field of insolvency law, a closing evaluation by a multinational panel of judges and several open floor segments, which substantially added to the range of experiences and views presented.

389. The experiences and views reported at the Colloquium reflected the general willingness and interest of judges to cooperate in cases of cross-border insolvencies, but also the fact that such cooperation was often hindered by disparity or inadequacy of law. That was so particularly in legal systems in which it was not typical for judges to exercise discretion in the absence of specific statutory rules and obligations. Moreover, even in jurisdictions where judges were given broad discretionary power, it had been shown that a legislative framework could provide added predictability as regards resolution of cross-border insolvencies.

390. In view of the above, the consensus view at the Judicial Colloquium was that it would be worthwhile for the Commission to attempt to provide such a legislative framework, for example, by way of model legislative provisions. A consensus at the Judicial Colloquium supported also the inclusion in the text to be prepared by the Commission of provisions on access and recognition. Finally, it was reported to the Commission that proposals made as to the possible form and content of the Commission's work included, for example, model legislative provisions containing a "menu of options" for legislators, possibly inspired in part by alternative approaches followed in existing legislation on judicial cooperation and on access and recognition.

391. Having before it the views expressed at the Judicial Colloquium, the Commission considered the next steps that it should take. Wide support was expressed for assigning to a working group on a priority basis the task of developing a model legislative framework for judicial cooperation and for access and recognition. At the same time, there was the view expressed that the subject of cross-border insolvency should not be accorded a priority higher than other topics being considered for future work. In support of that view it was stated that other work, such as on BOT (see below, paras. 394 - 400), was urgently needed, that the matter of cross-border insolvency might be considered adequately treated under domestic law or in accordance with judicial assistance treaties, and that the subject was not necessarily of a strictly commercial nature.

392. The prevailing view, however, was that the development of a legislative framework for judicial cooperation and for access and recognition in cross-border insolvencies should be assigned to a working group. It was noted that the various steps that had been taken by the Secretariat to ascertain the desirability and feasibility of work on the topic had identified an urgent need for the Commission to address in an area of critical importance for international trade, in particular since it was likely that the incidence of cross-border insolvency was likely to continue increasing. It was further noted that those preparatory steps had defined the scope and possible form of the work, so as to make it timely for the matter to be taken up by a working group. The Commission further noted that the assignment of the subject to a working group would not necessarily hamper advancing work on other subjects in which interest had been expressed, in view of the stage of development of work on those other subjects.

393. As to the specific content of the work by the Commission, a view was expressed in favour of including in cooperation legislation some version of an automatic stay of execution of claims. That would provide at least a minimum period of time to examine the request of the foreign insolvency representative before a liquidation or dismemberment of the insolvent estate. The Commission noted that the question would be examined by the Working Group along with a range of other questions that had been raised at the

Judicial Colloquium as regards the possible scope, approaches and effects of the legal text to be prepared. It was also noted that the work to be carried out would be aimed at taking account of approaches found in various legal systems and taking advantage of the experiences gained in various multilateral efforts in the field of insolvency.

B. Build-operate-transfer projects (BOT)

394. At the twenty-seventh session in 1994, the Secretariat had presented a note apprising the Commission of the progress of work in UNIDO on the preparation of "Guidelines for the Development, Negotiating and Contracting of BOT Projects" (A/CN.9/399), and suggesting possible areas in which the Commission could consider taking up future work. The Commission emphasized the relevance of BOT and requested the Secretariat to present a note for the twenty-eighth session of the Commission on possible future work on the subject of BOT projects.

395. Pursuant to that request, the Secretariat submitted to the Commission at the current session a note setting out the possible areas in which the Commission could take up work with regard to BOT (A/CN.9/414). It was reported that preparation of the Guidelines by UNIDO was at an advanced stage and that the Secretariat of the Commission had closely followed the work done on the Guidelines, in particular those aspects that related to possible future work by the Commission. It was also noted that the Guidelines were geared towards describing the main policy concerns that States should address when deciding whether or how to implement BOT projects and that, since the Guidelines covered the subject of BOT generally, they did not deal in extensive detail with the issues suggested for possible future work by the Commission. A statement by the observer of UNIDO provided the Commission with information on work being carried out in UNIDO on BOT projects, including progress on preparation of the UNIDO Guidelines. The Commission expressed its appreciation for the information provided.

396. It was reported that, due to a number of factors, there had been a substantial increase in many States in the number of BOT projects being implemented. Chief among the factors that had led to the interest in BOT projects was the potential for mobilization of private sector resources for infrastructure development without the necessity of raising the public debt. It was pointed out that it was particularly so at a time of an increase worldwide in privatization of various sectors previously reserved for the public sector, coupled with decreasing availability of public sector funds for infrastructure development. The other advantages included increased involvement of the private sector in the management of public infrastructure, increased potential for direct foreign investments and the opportunity for governments to use the BOT facilities as a benchmark for the performance of similar projects in the public sector. It was noted, however, that, despite the advantages and potential that existed for BOT projects, a number of practical obstacles of a legal nature might make it difficult to implement such projects. It was therefore suggested that the Commission could consider taking up work on BOT with a view to assisting States in alleviating some of the legal obstacles that made realization of BOT projects difficult.

397. It was reported that some of those obstacles might arise because of the lack of a proper legal and regulatory framework to attract long-term private-sector involvement in such projects. Since the private investors and financiers carried most of the risk for the performance of the project, they would have a keen interest in the existence of a legal infrastructure that encouraged long- term private investments, enabled a fair return on their investment and ensured the enforceability of the contractual obligations entered into by the various parties. It was therefore suggested that the Commission could consider preparation of guidelines to assist States in establishing a legal framework conducive to the implementation of BOT projects. Such guidelines could address the types of general business, investment and commercial legislation that would provide a sound legal basis for carrying out BOT projects, together with model legislative provisions that could be used by States wishing to prepare specific legislation to govern the implementation of such projects. It was suggested that model legislative provisions for BOT-specific legislation could deal with such issues as the legal basis for the granting of the concession, the extent of possible government support, the regulatory

framework for the management and operation of BOT projects and possible incentives that the Government might wish to grant.

398. It was further noted that additional obstacles to implementing BOT projects might arise, for example, as regards the procurement aspects of implementation. Unlike the normal practice in procurement for traditional projects, where the Government solicited tenders on the basis of a well-defined project within predetermined specifications, in BOT the call for tenders might precede any design work. To the extent that there might be a lack of clear guidelines as to the basis on which to evaluate tenders or proposals that would in all likelihood contain varied solutions to a set of problems, a lengthy and therefore costly bidding process might ensue, one that would run the risk of compromising the integrity of the procurement process. The Government also had to define clearly how to deal with unsolicited proposals since, in many instances, the private sector was encouraged to take the initiative in project identification. It was therefore suggested that future work on procurement could include guidance to Governments on means of carrying out procurement in a manner that best promoted competition and transparency and avoided negotiations conducted in a manner that might cause loss of confidence in the procurement process. That could include guidance on preparation of solicitation documents, preparation of criteria for evaluation and the means of carrying out the evaluation in different circumstances. Means by which such guidance could be provided might include preparation of model procurement regulations or of model bid solicitation documents for BOT.

399. It was reported that yet another obstacle to implementation of BOT projects was the limited experience, in particular on the Government side, in negotiating simultaneously with a multiplicity of parties, many of whom were contractually interrelated. Although most of the contracts involved in implementing BOT projects might not, in themselves, present any novel issues, the BOT context presented some problems in that all the various contracts had to fit into a composite contractual package. The suggestion was therefore made that another additional form of work on BOT, relating to contracting questions, could be initiated by a study by the Secretariat on the problems encountered in contracting for BOT. Such a study could include consideration of the means by which the Commission would carry out work in that respect, for example, by means of a supplement to the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.

400. Wide support was voiced in the Commission for taking up work in the areas suggested by the Secretariat. It was pointed out that the BOT project-financing mechanism had raised a considerable amount of interest in many States and that work by the Commission in the suggested areas would assist such States in tackling the problems that had been identified. It was noted, however, that, since the work to be undertaken by the Commission would be partly influenced by the final content of the UNIDO Guidelines, and taking into account that the practice with regard to BOT was still developing, it would be useful to provide the Secretariat with the opportunity to study further the issues proposed for future work. It was also noted that, in the three areas of possible work referred to, the Commission's work would be tailored so as not to duplicate work carried out by UNIDO on BOT projects. The Commission therefore requested the Secretariat to prepare a report on the issues proposed for future work with a view to facilitating discussion of the matter at the Commission's twenty-ninth session in 1996.

C. Monitoring implementation of the 1958 New York Convention

401. The Commission noted that the Secretariat had agreed with Committee D of the International Bar Association to cooperate in monitoring the implementation in national laws of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). It was said that the purpose of the project was in particular to look into the following questions: was the Convention incorporated into the national legal system of the States parties so that its provisions had the force of law; had States parties added to the uniform regime of the Convention provisions, whether pursuant to declared reservations to the Convention or otherwise, which modified the conditions of recognition or enforcement of awards; which

requirements for obtaining recognition and enforcement not contemplated in the Convention were added in national laws.

402. It was stressed that it was not the purpose of the project to monitor individual court decisions applying the Convention. Such an exercise would be beyond the resources of the Secretariat and was not necessary for the project as outlined above; furthermore, case law applying the Convention was being collected and published by other organizations, most notably in the Yearbook of Commercial Arbitration by the International Council for Commercial Arbitration (ICCA).

403. The primary purpose of the project was to publish the findings. It was said to be premature to predict whether any proposals to the Commission might emanate from the project. One tentative idea mentioned was the preparation of a guide for legislators, possibly with a model act implementing the Convention.

404. In order to enable the Secretariat to work on the project, the Commission called upon the States parties to the Convention to send to the Secretariat the laws dealing with the recognition and enforcement of foreign arbitral awards.

VII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

A. Introduction

405. Pursuant to a decision taken by the Commission at its twenty-first session (1988), the Secretariat established CLOUT ("Case Law on UNCITRAL Texts"). 15/ The mechanism for the operation of CLOUT was set forth in document A/CN.9/SER.C/GUIDE/1.

B. Consideration by the Commission

406. At its current session, the Commission noted with appreciation that since its twenty-seventh session (1994) three additional sets of abstracts with court decisions and arbitral awards relating to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration ("the Model Arbitration Law") were published (A/CN.9/SER.C/ABSTRACTS/4, 5 and 6). The conviction was widely expressed that CLOUT was beneficial, in particular in promoting the uniform interpretation and application of the statutory texts of UNCITRAL, which was an important aspect of the mandate of the Commission. The Commission also affirmed the importance to it of CLOUT, in the fulfilment of its responsibility of promoting the uniform interpretation and application of its legislative texts. That was in view, in particular, of the universal membership of the Organization and its ability to reach the users of those texts in all six United Nations languages.

407. The Commission also noted with appreciation that a draft thesaurus of the United Nations Sales Convention, namely an analytical list of issues arising in the context of the Convention, which had been prepared by the Secretariat, was finalized by Professor John O. Honnold. It was noted that the thesaurus could facilitate searches for decisions relevant to a given issue or a given article of the United Nations Sales Convention that could be undertaken in the context of both a paper publication and a data bank intended to be established by the Secretariat. In reply to a query raised, it was noted that a data bank containing abstracts could prove to be extremely useful if it were to be made available to users of the United Nations Sales Convention throughout the world via electronic communications systems. In that regard, the suggestion was made that a thesaurus should also be prepared for the Model Arbitration Law, in order to facilitate searches for decisions and arbitral awards applying the Model Law as well.

408. The Commission expressed its appreciation to the National Correspondents and the Secretariat for their work and urged States to cooperate with the Secretariat in the operation of CLOUT and to facilitate the carrying out of the tasks of the National Correspondents. It was suggested that States might consider ways and means by which the National Correspondents could be assisted in identifying and collecting court decisions and arbitral awards applying an UNCITRAL legislative text, in preparing abstracts thereon and in forwarding those abstracts to the Secretariat in a timely fashion. The Commission also urged States that had not yet appointed a National Correspondent to do so. It was noted that in order for CLOUT to achieve its full capacity in furthering the desired uniformity in interpretation and application of UNCITRAL texts it was important that CLOUT would be constantly updated and would reflect the case law of all implementing States.

409. The Commission noted that the Secretariat's work of editing abstracts, storing decisions and awards in their original form, translating abstracts into the other five United Nations languages, publishing them in the six United Nations languages, forwarding abstracts and full texts of decisions and awards to interested parties upon request and establishing and operating a data bank would substantially increase as the number of decisions and awards covered by CLOUT increased. The Commission therefore requested that adequate resources be made available to its Secretariat for the effective operation of CLOUT.

410. A number of queries were raised. One query referred to the conditions for the appointment of National Correspondents. In reply, it was noted that, as explained in the User Guide (para. 5), any State that had adopted a convention emanating from UNCITRAL or that had enacted legislation based on an UNCITRAL model law could appoint such a National Correspondent. It was also noted that National Correspondents might, for example, be lawyers in Government or private practice, or law professors or other individuals well positioned to monitor case decisions. The primary task of the National Correspondent was said to be to collect court decisions issued and arbitral awards published in his or her respective State that were of relevance to the interpretation and application of UNCITRAL legal texts. That meant in fact that National Correspondents would not necessarily report a case that merely referred to an UNCITRAL legal text, since it might have no interpretative value. Another query was whether decisions issued by an administrative body should be reported. In reply, it was explained that decisions of, e.g., administrative agencies might also be reported, provided that they had interpretative value.

411. With regard to the relationship between the Commission and the National Correspondents in CLOUT-related matters, the Commission reaffirmed its earlier decision that policy matters, such as, for example, the question of cooperation with private entities, fell within its mandate, while the specific details of the operation of CLOUT should be left to the discretion of the National Correspondents. 16/

VIII. TRAINING AND TECHNICAL ASSISTANCE

412. The Commission had before it a note by the Secretariat (A/CN.9/415) outlining the training and technical assistance activities of the Commission that had taken place since the previous session and indicating the direction of future activities being planned. UNCITRAL seminars and briefing missions for Government officials are designed to explain the salient features and utility of international trade law instruments of UNCITRAL, as well as of certain texts relevant to international trade law prepared by other organizations. The Secretariat might be requested to provide a briefing mission when, for example, a developing country or newly independent State is considering the role that UNCITRAL legal texts are to play in its law reform.

413. It was reported that since the previous session, the following seminars and briefing missions had taken place: (a) Shanghai, China (27-28 June 1994), held in cooperation with the China International Economic and Trade Commission (CIETAC), and attended by approximately 90 participants; (b) Harare, Zimbabwe (1-3 August 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 70 participants; (c) Gaborone, Botswana (8-10 August 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 50 participants; (d) Windhoek, Namibia (12-16 August 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 30 participants; (e) Nairobi, Kenya (12-15 September 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 60 participants; (f) Tbilisi, Georgia (7-9 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs; (g) Baku, Azerbaijan (11-15 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs; (h) Yerevan, Armenia (16-18 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs; (i) Panama City, Panama (17-18 November 1994), held in cooperation with the Chamber of Commerce and Boutin Law Firm, and attended by approximately 150 participants; (j) Cali, Colombia (21- 22 November 1994), held in cooperation with the Chamber of Commerce and the Inter-American Commission of Commercial Arbitration, and attended by approximately 150 participants; (k) Tashkent, Uzbekistan (21-23 November 1994), briefing mission held in cooperation with the Ministry of Foreign Economic Relations; (l) Prague, Czech Republic (4-5 April 1995), held in cooperation with the Ministry of Industry and Trade, and attended by approximately 70 participants.

414. The Commission noted that the Sixth UNCITRAL Symposium on International Trade Law was being held, on the occasion of the twenty-eighth session of the Commission, from 22 to 26 May 1995. As was the case at previous Symposia, lecturers were invited primarily from delegations to the Commission session and from the Secretariat. The travel and subsistence costs of twenty-three participants from Africa, Asia, Eastern Europe and Latin America were paid from the UNCITRAL Trust Fund for Symposia. In addition, sixty-five individuals attended without such financial assistance.

415. The Secretariat reported that technical assistance was provided to States preparing legislation based on UNCITRAL model laws in the areas of international commercial arbitration, procurement and international credit transfers. Such assistance was requested to take various forms, including, for example, reviews of preparatory drafts of legislation from the viewpoint of UNCITRAL model laws, assistance in the preparation of drafts, comments on reports of law reform commissions, and briefings for legislators, judges, arbitrators and other end users of UNCITRAL legal texts embodied in national legislation (e.g., judges, arbitrators and procurement managers).

416. In order to facilitate further the provision of technical assistance by the Secretariat, the Commission authorized the Secretariat to request States to provide it with legislation currently in effect in the areas of activity of the Commission.

417. The Secretariat reported that, for the remainder of 1995, seminars and legal-assistance briefing missions were being planned in Africa, Asia, Latin America and Eastern Europe.

418. It was also reported that, as it had done in recent years, the Secretariat had agreed to co-sponsor the next three-month International Trade Law Post-Graduate Course to be organized by the University Institute of European Studies and the International Training Centre of the International Labour Organization in Turin. In 1994, the fourth year in which the Course was offered, approximately half of the participants were from Italy and 26 from outside of Italy, with a majority of those being from developing countries. Issues of harmonization of international trade law and various items on the Commission's work programme were covered in the Course.

419. The Commission noted with approval that the Secretariat had taken steps to obtain cooperation and coordination with other agencies, both within and without the United Nations system, in the provision of training and technical assistance in the field of international trade law. It also noted reports that there apparently was an increase in attention being paid by States to law reform relating to international trade, as well as a degree of increasing attention by bilateral and multilateral development agencies, including other parts of the United Nations system, to the importance of harmonization and modernization of commercial law. It was noted that, from the standpoint of States that were the recipients of legal technical assistance, such cooperation and coordination was particularly desirable. It was emphasized that coordination and cooperation among technical assistance agencies increased the extent to which the guidance and assistance would help to establish legal systems that not only were internally consistent, but also utilized internationally developed trade law conventions, model laws, and other legal texts and would thus maximize the ability of business parties from different states to plan and implement business transactions successfully.

420. The Commission therefore expressed its appreciation and renewed its call for continued and increased cooperation and coordination among entities providing legal technical assistance, with a view to ensuring that, when United Nations system entities, such as the United Nations Development Programme and the International Bank for Reconstruction and Development, or outside entities, are involved in providing legal technical assistance, the legal texts formulated by the Commission and recommended by the General Assembly to be considered are in fact so considered and used.

421. The Commission noted that the ability of the Secretariat to implement training and technical assistance plans was contingent upon the receipt of sufficient funds in the form of contributions to the UNCITRAL Trust Fund for Symposia, as well as on the provision to the Secretariat of the necessary human resources, which was not currently the case. In the current situation, the demand for training and technical assistance with respect to UNCITRAL legal texts and the need to promote the use of those texts, remained to a significant extent unfulfilled. It was noted that no funds for the travel of participants and lecturers had been provided for in the regular budget. As a result, expenses had to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia, which remained at an insufficiently low level.

422. In order to facilitate the making of contributions to the UNCITRAL Trust Fund for Symposia, the Commission decided to request that it be placed on the agenda of the pledging conference taking place within the framework of the General Assembly session, on the understanding that that would not have any effect on the obligation of a State to pay its assessed contribution to the Organization.

423. It was noted that of particular value were contributions made to the UNCITRAL Trust Fund for Symposia on a multi-year basis, because they permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such a contribution has been received from Canada. In addition, contributions from Austria, Denmark, France, Pakistan and Switzerland have been used for the seminar programme. The Commission expressed its appreciation to those States and organizations that have contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars. The Commission also renewed its call that it be provided with the human resources to meet the need for its training and technical assistance activities.

IX. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

424. The Commission considered the status of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) ("the Limitation Period Convention"), the Protocol amending the Limitation Convention (Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) ("the UNCITRAL Bills and Notes Convention") and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) ("the United Nations Terminal Operators Convention"). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Arbitration Model Law").

425. The Commission noted with pleasure that, since the report submitted to the Commission at its twenty-seventh session (1994), Cuba had deposited an instrument of accession and Poland an instrument of ratification with regard to the Limitation Period Convention, and that both States had deposited instruments of accession with regard to the Protocol amending the Limitation Period Convention.

426. The Commission was pleased to note that the Czech Republic had deposited an instrument of succession to the signature by the former Czechoslovakia of the Hamburg Rules.

427. The Commission was pleased to note the deposit, since its twenty-seventh session, of instruments of ratification by Poland and Singapore with regard to the United Nations Sales Convention and the accession to the Convention by Cuba, Georgia, Lithuania, Moldova and New Zealand.

428. The Commission was pleased to note that, since its twenty-seventh session, instruments of accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards had been deposited by Bolivia, Lithuania, Mali, Mongolia, Portugal, Senegal, Venezuela and Zimbabwe.

429. The Commission noted with pleasure that, since its twenty-seventh session, legislation based on the UNCITRAL Arbitration Model Law had been enacted in Bahrain, Hungary, Singapore and Ukraine.

Hamburg Rules

430. The Commission recalled its consideration at its twenty-seventh session (1994) of the status of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"). 17/ The Commission reiterated its serious concern about the problems that arose as a result of the coexistence of different liability regimes relating to the carriage of goods by sea. 18/

431. The Commission noted that, pursuant to the considerations at that session, the Secretary-General had sent a note verbale to the Member States of the United Nations, informing them of the considerations of the Commission and of the Secretary-General's conviction that the problems could best be overcome by a wide adherence to the Hamburg Rules, and recommending to the Governments to consider an early adherence to the Hamburg Rules.

432. Recalling and appreciating that the CMI had expressed an interest in working together with the Commission towards a solution that would produce uniformity of law, 19/ the Commission was informed that CMI had received some twenty-two replies to a questionnaire it had sent to its member national organizations

seeking their opinions on how the current problems could be overcome. While an analysis of the replies had yet to be formulated by CMI, the conclusion could be drawn that no consensus view was emerging as to how the law of the carriage of goods by sea should be modernized and harmonized.

433. The Commission requested the Secretary-General of the United Nations to continue his efforts to promote wider adherence to the Hamburg Rules.

Activities of other organizations

434. The Commission heard, with interest, a statement on behalf of the Asian-African Legal Consultative Committee (AALCC) about the activities of its standing committee on trade law matters in relation to monitoring and reviewing international trade law from an African-Asian perspective. The Commission was informed of two of its initiatives, namely, the preparation of legal and institutional guidelines for privatization programmes and for a post-privatization regulatory framework and the promotion of standardization and harmonization of commercial law and practices in the Afro-Asian region.

435. The Commission heard, with interest, a statement on behalf of UNIDROIT concerning its current work in establishing a data bank on uniform law, including a planned meeting with relevant international organizations in Rome in early 1996 to discuss the feasibility of the project.

436. The Commission was also informed of the activities of the Organization of American States with regard to pursuing the unification and harmonization of trade law in the Americas. The Commission took note of the completion of the Inter-American Convention on the law applicable to international contracts prepared by the Specialized Conference on Private International Law, sponsored by the Organization.

X. GENERAL ASSEMBLY RESOLUTIONS ON THE WORK OF THE COMMISSION

437. The Commission took note with appreciation of General Assembly resolution 49/54 of 9 Decenber 1994, in which the General Assembly noted with satisfaction the adoption by the Commission of the UNCITRAL Model Law on Procurement of Goods, Construction and Services and of the Guide to Enactment of the Model Law. In paragraph 2 of the resolution, the General Assembly recommended that, in view of the desirability of improvement and uniformity of the laws of procurement, all States should give favourable consideration to the Model Law when they enact or revise their procurement laws.

438. The Commission took note with appreciation of General Assembly resolution 49/55 of 17 February 1995 on the report of the twenty-seventh session of the Commission, held in 1994. In particular, it was noted that in paragraph 7 the General Assembly appealed to Governments, the relevant United Nations organs, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the Trust Fund for the Commission to grant travel assistance to developing countries that were members of the Commission. That Trust Fund was established pursuant to resolution 48/32 of 9 December 1993.

439. The Commission further noted with appreciation the decision of the General Assembly in paragraph 8 to continue its consideration in the competent Main Committee, made during the forty-ninth Session of the General Assembly in 1994, of the matter of granting travel assistance, within existing resources, to the least developed countries that were members of the Commission, at their request and in consultation with the Secretary-General, in order to ensure the full participation by all member States in the sessions of the Commission and its working groups.

440. The Commission also noted with appreciation that the General Assembly, in paragraph 10, stressed the importance of bringing into effect the conventions emanating from the work of the Commission for the global unification and harmonization of international trade law, and that, to that end, it had urged States that had not done so to consider signing, ratifying or acceding to those conventions.

441. The Commission further noted with appreciation that, in paragraph 4, the General Assembly reaffirmed the importance, in particular for developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law, and that, in paragraph 5, the General Assembly expressed the desirability for the Commission to sponsor seminars and symposia to provide such training and assistance. It was observed that the Commission had increased its training and assistance within the limited human and financial resources available.

442. The Commission welcomed the request by the General Assembly to the Secretary-General to ensure that adequate resources should be allocated for the effective implementation of the programmes of the Commission. The Commission in particular hoped that the Secretariat would be allocated sufficient resources to meet the increased demands for training and assistance and the growing workload relating to the "Case law on UNCITRAL texts" (CLOUT) (see above, paras. 405 to 411).

443. The Commission was informed that efforts were being made within the Secretariat of the Organization to allocate sufficient resources to the Secretariat of the Commission. However, as it was probable that additional resources were not likely to be made available so as to meet the needs of the Secretariat of the Commission, the Commission appealed to the Governments to come to the assistance of the Secretariat. It was suggested that the assistance by Governments or their aid agencies might take various forms. Among those mentioned were: assigning to the Secretariat of the Commission, for a year or so, lawyers who would be integrated, as United Nations Associate Experts, into the work of the Secretariat; reserving some research capacity in national institutions for comparative law research on possible future work topics; co-sponsoring seminars jointly with the Secretariat; delegating lecturers to seminars on texts emanating from the Commission; donating air-tickets and accommodation for lecturers or for participants in regional seminars coming from developing countries; and sponsoring and covering costs of interns, in particular those from developing countries, in the Secretariat of the Commission.

XI. OTHER BUSINESS

A. Bibliography

444. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/417).

445. The Commission stressed that it was important for it to have as complete as possible information about publications, including academic theses, commenting on results of its work. It therefore requested Governments, academic institutions and other relevant organizations to send to the Secretariat copies of such publications.

B. Willem C. Vis International Commercial Arbitration Moot

446. It was reported to the Commission that the Institute of International Commercial Law at the Pace University School of Law, New York, had organized the second Willem C. Vis International Commercial Arbitration Moot (Vienna, 22 to 26 March 1995). Legal issues that the teams of students participating in the Moot dealt with were based on the United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods, UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Arbitration Rules. In the 1995 Moot, 22 teams participated from Law Schools from fifteen countries. The third Moot would be held in March 1996 at Vienna.

447. The Commission heard the report with interest and appreciation. It regarded the Moot, with its international participation, as an excellent method of teaching international trade law and disseminating information about current uniform texts.

C. Date and place of the twenty-ninth session of the Commission

448. It was decided that the Commission would hold its twenty-ninth session from 28 May to 14 June 1996 in New York, at which time it would complete work on the draft Model Law on Electronic Data Interchange and the Notes on Organizing Arbitral Proceedings.

D. Sessions of working groups

449. It was decided that the name of the Working Group on the New International Economic Order would be changed to "Working Group on Insolvency Law", in order to reflect the subject being assigned to it. It was further decided that the Working Group would hold its eighteenth session from 30 October to 10 November 1995 at Vienna. The Commission authorized holding a nineteenth session of the Working Group from 1 to 12 April 1996 in New York, should, in the view of the Working Group, the progress of work so warrant.

450. It was decided that the Working Group on International Contract Practices would hold its twenty-fourth session from 13 to 24 November 1995 at Vienna, which would be devoted to work on assignment in receivables financing.

451. While the Commission agreed that the Working Group on Electronic Data Interchange would hold its thirtieth session from 4 to 15 March 1996 at Vienna, it was later determined, for reasons relating to the

availability of interpretation services, that the thirtieth session of the Working Group had to take place from 26 February to 8 March 1996 at Vienna.

Notes

1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected at its forty-sixth session on 4 November 1991 (decision 46/309) and 17 were elected by the Assembly at its forty-ninth session on 28 November 1994 (decision 49/315). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-sixth session will expire on the last day prior to the opening of the thirty-first session of the Commission, in 1998, while the term of those members elected at the forty-ninth session will expire on the last day prior to the opening of the thirty-fourth regular annual session of the Commission, in 2001.

2/ The election of the Chairman took place at the 547th meeting, on 2 May 1995, the election of the Vice-Chairmen at the 571st meeting, on 18 May 1995, and at the 574th meeting, on 19 May 1995; the election of the Rapporteur took place at the 566th meeting, on 15 May 1995. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, paragraph 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 14 (Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970, United Nations publication, Sales No. E.71.V.1, part two, I, A)).

3/ Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 25.

4/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

5/ Ibid., Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 314-317.

6/ Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

7/ "Legal Aspects of Automatic Trade Data Interchange" (TRADE/WP.4/R.185/Rev.1, paras. 12 and 149). The text of that study was reproduced in A/CN.9/238, Annex II.

8/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 291-296.

9/ Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 111-195.

10/ Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), para. 295.

11/ Ibid., para. 301.

12/ Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), para. 210.

13/ Ibid., paras. 215-222.

14/ Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 302-306.

15/ For background information on CLOUT, see A/CN.9/267; Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), para. 377; A/CN.9/312; and Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), paras. 98-109.

16/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 207.

17/ bid., paras. 247 - 252.

18/ Ibid., para. 249.

19/ Ibid., para. 251.

ANNEX I

[Original: Arabic, Chinese, English,
French, Russian, Spanish]

DRAFT UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

(1) This Convention applies to an international undertaking referred to in article 2:

(a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) If the rules of private international law lead to the application of the law of a Contracting State,

unless the undertaking excludes the application of the Convention.

(2) This Convention applies also to an international letter of credit not falling within article 2 if it expressly states that it is subject to this Convention.

(3) The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of paragraph (1) of this article.

Article 2. Undertaking

(1) For the purposes of this Convention, an undertaking is an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

(2) The undertaking may be given:

(a) At the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;

(b) On the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or

(c) On behalf of the guarantor/issuer itself.

(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) Payment in a specified currency or unit of account;

(b) Acceptance of a bill of exchange (draft);

(c) Payment on a deferred basis;

(d) Supply of a specified item of value.

(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

Article 3. Independence of undertaking

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not:

(a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate); or

(b) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations.

Article 4. Internationality of undertaking

(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

CHAPTER II. INTERPRETATION

Article 5. Principles of interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit.

Article 6. Definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "Undertaking" includes "counter-guarantee" and "confirmation of an undertaking";

(b) "Guarantor/issuer" includes "counter-guarantor" and "confirmer";

(c) "Counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;

(d) "Counter-guarantor" means the person issuing a counter-guarantee;

(e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(f) "Confirmer" means the person adding a confirmation to an undertaking;

(g) "Document" means a communication made in a form that provides a complete record thereof.

CHAPTER III. FORM AND CONTENT OF UNDERTAKING

Article 7. Issuance, form and irrevocability of undertaking

(1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.

(2) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

(3) From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.

(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable.

Article 8. Amendment

(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if the amendment has previously been authorized by the beneficiary.

(3) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, where any amendment has not previously been authorized by the beneficiary, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph (2) of article 7.

(4) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment.

Article 9. Transfer of beneficiary's right to demand payment

(1) The beneficiary's right to demand payment may be transferred only if authorized in the undertaking, and only to the extent and in the manner authorized in the undertaking.

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

Article 10. Assignment of proceeds

(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

(2) If the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, in a form referred to in paragraph (2) of article 7, of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking.

Article 11. Cessation of right to demand payment

(1) The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement by the beneficiary of release from liability in a form referred to in paragraph (2) of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

(2) The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article. However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraph (c) or (d) of paragraph (1) of this article preserve any rights of the beneficiary under the undertaking.

Article 12. Expiry

The validity period of the undertaking expires:

(a) At the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) If expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer is advised that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) If the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document and an expiry date has not been stated in addition, when six years have elapsed from the date of issuance of the undertaking.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 13. Determination of rights and obligations

(1) The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Convention.

(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice.

Article 14. Standard of conduct and liability of guarantor/issuer

(1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

(2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

Article 15. Demand

(1) Any demand for payment under the undertaking shall be made in a form referred to in paragraph (2) of article 7 and in conformity with the terms and conditions of the undertaking.

(2) Unless otherwise stipulated in the undertaking, the demand and any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made, to the guarantor/issuer at the place where the undertaking was issued.

(3) The beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith and that none of the elements referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19 are present.

Article 16. Examination of demand and accompanying documents

(1) The guarantor/issuer shall examine the demand and any accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days following the day of receipt of the demand and any accompanying documents, in which to:

(a) Examine the demand and any accompanying documents;

(b) Decide whether or not to pay;

(c) If the decision is not to pay, issue notice thereof to the beneficiary.

The notice referred to in subparagraph (c) above shall, unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, be made by teletransmission or, if that is not possible, by other expeditious means and indicate the reason for the decision not to pay.

Article 17. Payment

(1) Subject to article 19, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 15. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

(2) Any payment against a demand that is not in accordance with the provisions of article 15 does not prejudice the rights of the principal/applicant.

Article 18. Set-off

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant or the instructing party.

Article 19. Exception to payment obligation

(1) If it is manifest and clear that:

(a) Any document is not genuine or has been falsified;

(b) No payment is due on the basis asserted in the demand and the supporting documents; or

(c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis,

the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

(2) For the purposes of subparagraph (c) of paragraph (1) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;

(e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates.

(3) In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph (1) of this article, the principal/applicant is entitled to provisional court measures in accordance with article 20.

CHAPTER V. PROVISIONAL COURT MEASURES

Article 20. Provisional court measures

(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the circumstances referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19 is present, the court, on the basis of immediately available strong evidence, may:

(a) Issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or

(b) Issue a provisional order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

(2) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(3) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than those referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19, or use of the undertaking for a criminal purpose.

CHAPTER VI. CONFLICT OF LAWS

Article 21. Choice of applicable law

The undertaking is governed by the law the choice of which is:

(a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or

(b) Agreed elsewhere by the guarantor/issuer and the beneficiary.

Article 22. Determination of applicable law

Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued.

CHAPTER VII. FINAL CLAUSES

Article 23. Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article 24. Signature, ratification, acceptance, approval, accession

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until ....[the date two years from the date of adoption].

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 25. Application to territorial units

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State.

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 26. Effect of declaration

(1) Declarations made under article 25 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under article 25 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

Article 27. Reservations

No reservations may be made to this Convention.

Article 28. Entry into force

(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting State referred to in subparagraph (a) or the Contracting State referred to in subparagraph (b) of paragraph (1) of article 1.

Article 29. Denunciation

(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at ..., this ... day of ... one thousand nine hundred and ninety-...., in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

* * *

ANNEX II

[Original: Arabic, Chinese, English,
French, Russian, Spanish]

Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication

Part I. Text of articles 1 and 3 to 11 as they result from the work of the Commission at its twenty-eighth session

CHAPTER I. GENERAL PROVISIONS*

Article 1. Sphere of application**

This Law applies to any kind of information in the form of a data message used in the context of commercial*** activities.****

Article 3. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

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* This Law does not override any rule of law intended for the protection of consumers.

** The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:

> This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce.

*** The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

**** The Commission suggests the following text for States that might wish to extend the applicability of this Law:

> This Law applies to any kind of information in the form of a data message [used in the context of ...] [, except in the following situations: ...].

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

CHAPTER II. APPLICATION OF LEGAL REQUIREMENTS TO DATA MESSAGES

Article 4. Legal recognition of data messages

Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message.

Article 5. Writing

(1) Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference.

(2) The provisions of this article do not apply to the following: [...].

Article 6. Signature

(1) Where a rule of law requires a signature, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

(a) a method is used to identify the originator of the data message and to indicate the originator's approval of the information contained therein; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

(2) The provisions of this article do not apply to the following: [...].

Article 7. Original

(1) Where a rule of law requires information to be presented or retained in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:

(a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

(b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

(2) Where any question is raised as to whether subparagraph (a) of paragraph (1) of this article is satisfied:

(a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

(b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

(3) The provisions of this article do not apply to the following: [...].

Article 8. Admissibility and evidential weight of data messages

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

(a) on the sole ground that it is a data message; or,

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

Article 9. Retention of data messages

(1) Where a rule of law requires that certain documents, records or information be retained, that rule is satisfied by retaining data messages, provided that the following conditions are met:

(a) the information contained therein is accessible so as to be usable for subsequent reference; and

(b) the data message is retained in the format in which it was generated, transmitted or received, or in a format which can be demonstrated to represent accurately the information generated, transmitted or received; and

(c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time of its transmission or reception.

(2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be transmitted or received.

(3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

CHAPTER III. COMMUNICATION OF DATA MESSAGES

Article 10. Variation by agreement

(1) As between parties involved in generating, storing, communicating, receiving or otherwise processing data messages, and except as otherwise provided, the provisions of this chapter may be varied by agreement.

(2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.

Article 11. Attribution of data messages

(1) A data message is that of the originator if it was communicated by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by a person who had the authority to act on behalf of the originator in respect of that data message.

(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

(a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure for that purpose which was:

(i) previously agreed by the originator; or

(ii) reasonable in the circumstances; or

(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

(4) Paragraph (3) shall not apply:

(a) after the addressee has received notice within a reasonable time from the originator that the data message is not that of the originator; or

(b) in a case within paragraph (3)(a)(ii) or (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the content of the data message as received as being what the originator intended to transmit, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the content of the data message as received.

[(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption unless it repeats the content of another data message, and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the repetition was a duplication and not the transmission of a separate data message.]

Part II. Text of articles 2 and 12 to 14 as they resulted from the work of the Working Group on Electronic Data Interchange at its twenty-eighth session

(The text of those articles was not considered by the Commission at its twenty-eighth session.)

Article 2. Definitions

For the purposes of this Law:

(a) "Data message" means information generated, stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to have been generated, stored or communicated, but it does not include a person acting as an intermediary with respect to that data message;

(d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) "Intermediary", with respect to a particular data message, means a person who, on behalf of another person, receives, transmits or stores that data message or provides other services with respect to that data message;

(f) "Information system" means a system for generating, transmitting, receiving or storing information in a data message.

Article 12. Acknowledgement of receipt

(1) This article applies where, on or before sending a data message, or by means of that data message, the originator has requested an acknowledgement of receipt.

(2) Where the originator has not requested that the acknowledgement be in a particular form, the request for an acknowledgement may be satisfied by any communication or conduct of the addressee sufficient to indicate to the originator that the data message has been received.

(3) Where the originator has stated that the data message is conditional on receipt of that acknowledgement, the data message has no legal effect until the acknowledgement is received.

(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time:

(a) The originator may give notice to the addressee stating that no acknowledgement has been received and specifying a time, which must be reasonable, by which the acknowledgement must be received; and

(b) If the acknowledgement is not received within the time specified in subparagraph (a), the originator may, upon notice to the addressee, treat the data message as though it had never been transmitted, or exercise any other rights it may have.

(5) Where the originator receives an acknowledgement of receipt, it is presumed that the related data message was received by the addressee. Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.

Article 13. Formation and validity of contracts

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

(2) The provisions of this article do not apply to the following: [...].

Article 14. Time and place of dispatch and receipt of data messages

(1) Unless otherwise agreed between the originator and the addressee of a data message, the dispatch of a data message occurs when it enters an information system outside the control of the originator.

(2) Unless otherwise agreed between the originator and the addressee of a data message, the time of receipt of a data message is determined as follows:

(a) If the addressee has designated an information system for the purpose of receiving such data messages, receipt occurs at the time when the data message enters the designated information system, but if the data message is sent to an information system of the addressee that is not the designated information system, receipt occurs when the data message is retrieved by the addressee;

(b) If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is received under paragraph (4).

(4) Unless otherwise agreed between the originator and the addressee of a computerized transmission of a data message, a data message is deemed to be received at the place where the addressee has its place of business, and is deemed to be dispatched at the place where the originator has its place of business. For the purposes of this paragraph:

(a) If the addressee or the originator has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) If the addressee or the originator does not have a place of business, reference is to be made to its habitual residence.

(5) Paragraph (4) shall not apply to the determination of place of receipt or dispatch for the purpose of any administrative, criminal or data-protection law.

ANNEX III

List of documents before the Commission at its twenty-eighth session

A. General series

A/CN.9/404	Provisional agenda, annotations thereto and scheduling of meetings of the twenty-eighth session
A/CN.9/405	Report of the Working Group on International Contract Practices on the work of its twenty-second session
A/CN.9/406	Report of the Working Group on Electronic Data Interchange on the work of its twenty-eighth session
A/CN.9/407	Report of the Working Group on Electronic Data Interchange on the work of its twenty-ninth session
A/CN.9/408	Report of the Working Group on International Contract Practices on the work of its twenty-third session
A/CN.9/409	Draft Model Law on Legal Aspects of Electronic Data and Add.1-4 Interchange (EDI) and Related Means of Communication: compilation of comments by Governments and international organizations
A/CN.9/410	International commercial arbitration: draft Notes on Organizing Arbitral Proceedings
A/CN.9/411	Draft Convention on Independent Guarantees and Stand-by Letters of Credit
A/CN.9/412	Assignment in receivables financing: discussion and preliminary draft of uniform rules
A/CN.9/413	Cross-border insolvency: report on UNCITRAL - INSOL Judicial Colloquium on Cross-Border Insolvency
A/CN.9/414	Possible future work: Build-Operate-Transfer projects
A/CN.9/415	Training and technical assistance
A/CN.9/416	Status of Conventions
A/CN.9/417	Bibliography of recent writings related to the work of UNCITRAL

B. Restricted series

A/CN.9/XXVIII/CRP.1 and Add.1-22	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session

A/CN.9/XXVIII/CRP.2 and Add.1-5	Report of the Drafting Group
A/CN.9/XXVIII/CRP.3	Proposals on article 19
A/CN.9/XXVIII/CRP.4	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session: Draft Convention on Independent Guarantees and Stand-by Letters of Credit: Decision of the Commission and recommendation to the General Assembly
A/CN.9/XXVIII/CRP.5 and Add.1-2	Report of the Drafting Group
A/CN.9/XXVIII/CRP.6	Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Data Communication: proposal by the United Kingdom for a redrafted article 11
A/CN.9/XXVIII/CRP.7	Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Data Communication: proposal by the United Kingdom, United States of America and Australia for a redrafted article 11

C. Information series

A/CN.9/XXVIII/INF.1	Provisional list of participants
A/CN.9/XXVIII/INF.1/Rev.1	List of participants